140-118

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 1351.

JOHN C. BALL AND ROBERT E. BOUTWELL, PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

FILED OCTOBER 6, 1890.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the eastern district of Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, or some of you, between The United States, plaintiff, and John C. Ball and Robert E. Boutwell, defendants, which cause is numbered 3 on the criminal docket of said court holding sessions at Paris, a manifest error hath happened, to the great damage of the said John C. Ball and Robert E. Boutwell, as by their complaint appears. We being willing that error, if any hath been should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 9th day of September, in the year of our Lord one thousand eight hundred and ninety.

[SEAL.] H. H. KIRKPATRICK,
Clerk of the Circuit Court of the United States for the Eastern District of Texas, at Paris.

Allowed by
DAVID E. BRYANT,
U. S. Dist. Judge, E. D. Texas.

2 I, H. H. Kirkpatrick, clerk of the circuit court of the United States for the eastern district of Texas, at Paris, hereby certify that I received this writ on the 9th day of September, A. D. 1890, and that I this first day of October, A. D. 1890, sent a true copy of the record and proceedings in the within named cause to the Supreme Court of the United States as herein commanded.

Witness my hand and the seal of said court the day and date last above written.

[SEAL.] H. H. KIRKPATRICK,
Clerk.

3 UNITED STATES OF AMERICA, *ss:*

The President of the United States to Joseph H. Wilson, United States attorney for the eastern district of Texas, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Texas, at Paris, wherein John C. Ball and Robert E. Boutwell are plain-

tiffs in error and The United States is defendant in error, to show cause if any there be, why the judgment and sentence rendered against the said plaintiffs in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States this 11th day of September, in the year of our Lord one thousand eight hundred and ninety.

[SEAL.] H. H. KIRKPATRICK,
Clerk of the Circuit Court of the United States for the Eastern District of Texas, at Paris.

4 On this eleventh day of September, in the year of our Lord one thousand eight hundred and ninety, personally appeared before me, the subscriber, Raymond Herz, deputy United States marshal for the eastern district of Texas, and makes oath that he delivered a true copy of the within citation to Joseph H. Wilson, United States attorney for the eastern district of Texas, at Paris, in said eastern district of Texas.

RAYMOND HERZ,
Deputy Marshal.

Sworn to and subscribed the eleventh day of September, A. D. 1890.

[SEAL.] H. H. KIRKPATRICK,
Clerk U. S. Circuit Court for the Eastern District of Texas at Paris.

5 Be it remembered that on this second Monday of October, 1889, the same being the 14th day of the month, there was begun and holden at the city of Paris a regular term of the honorable circuit court of the United States for the eastern district of Texas:

Present and presiding, Hon. Aleck Boarman, judge; also present, J. E. McComb, U. S. attorney; Joseph H. Wilson, assistant U. S. attorney; J. J. Dickerson, U. S. marshal, and H. H. Kirkpatrick, clerk; when the following proceedings were had, to wit:

THURSDAY, OCTOBER 17*th*, 1889.

This day came the grand jury, and, a quorum being present, presented in open court the following bill of indictment, to wit:

THE UNITED STATES
v. } 3. Murder.
M. F. BALL, J. C. BALL, & R. E. BOUTWELL.

Which is ordered to be filed by the clerk.

6 In the name and by the authority of the United States of America, in the circuit court of the United States of America for th eastern district of Texas, in the fifth circuit.

At a stated term of the circuit court of the United States of America for the eastern district of Texas, in the fifth circuit, begun and held at Paris, Texas, within and for the district and circuit aforesaid, on the second Monday, the same being the fourteenth (14) day of October, in the year of our Lord eighteen hundred and eighty-nine, and continued by adjournment to and including the seventeenth day of October, in the year of our Lord eighteen hundred and eighty-nine.

EASTERN DISTRICT OF TEXAS, *sct.:*

The grand jurors of the United States of America, duly elected, impanneled, tried, sworn, and charged to inquire into and due presentment make of offenses against the laws of the United States of America in and for the district and circuit aforesaid, on their oath in said court present:

That one M. F. Ball and one J. C. Ball and one R. E. Boutwell, whose names are to the grand jurors otherwise unknown, late of the county of Pickens, in the Chickasaw Nation, in the Indian Territory, in the district and circuit aforesaid, on the twenty-sixth day of June, in the year of our Lord eighteen hundred and eighty-nine, in said Pickens County, in said Chickasaw Nation, in the Indian Territory, the same being annexed to and constituting a part of the said fifth circuit, and annexed to and constituting part of the eastern district of Texas, for judicial purposes, and being within the jurisdiction of this court, did unlawfully, fraudulently, and feloneously, and with their malice aforethought, and with a certain deadly weapon, to wit, a certain gun in the hands of the said M. F. Ball, J. C. Ball,
7 and R. E. Boutwell, then and there held, make an assault in and upon the body of one William T. Box with said gun held as aforesaid, said gun being then and there loaded and charged with gunpowder and leaden balls, then and there held and used as aforesaid, the said M. F. Ball and the J. C. Ball and the said R. E. Boutwell did shoot off and discharge the contents of said gun in and upon the body of the said William T. Box, inflicting thereon ten mortal wounds, of which mortal wounds the said William T. Box did languish, and languishing did die.

And so the grand jurors aforesaid, upon their oaths aforesaid, do say, that upon the day aforesaid, at the place aforesaid, with said deadly weapon aforesaid, in the manner aforesaid, and used as aforesaid, did unlawfully, feloneously, and with their malice aforethought, and the malice aforethought of each of them, did kill and murder the said William T? Box, the said M. F. Ball and J. C. Ball and R. E. Boutwell, and each of them, being there, white men and not citizens of said Chickasaw Nation, or of the Indian Territory, or any nation or tribe thereof, contrary to the form of the statutes of the United States of America in such cases made and provided, and against the peace and dignity of the United States of America.

E. M. ALEXANDER,
Foreman of the Grand Jury.

J. E. MCCOMB,
U. S. Atty., E. D. T.

(Endorsed:) No. 3. The United States *vs.* M. F. Ball, J. C. Ball, R. E. Boutwell. Murder in I. T. A true bill. E. M. Alexander, foreman of the grand jury.

8 U. S. witnesses:

Mrs. Lucy B. Mayfield (alias Ball) Burneyville, Chickasaw Nation, I. T.
John Beaty, Burneyville, Chickasaw Nation, I. T.
Nannie Blunt " " " "
Pery C. Speller " " " "
Wm. Anglin " " " "
Robert Blount " " " "
Wat. R. Cornish " " " "

U. S. witnesses—Continued.

Bird Ashburn, Burneyville, Chickasaw Nation, I. T.
Kener Conley " " " "
James Williams " " " "
W. C. Frazier " " " "
Dallas Smith " " " "
L. T. Blount " " " "
J. F. Horne, Burneyville, Chickasaw Nation.
E. S. Burney " " "
J. P. Cross " " "
Harman Horne " " "
George Williams " " "
Heck Thomas, Fort Smith, Ark.
John Cornish, Burneyville.
A. S. Kemper "
Wilson Jones "
John Hays "
—— Burch
Dave Mays
Overton Love
—— Christopher

Filed Oct. 17, 1889, in open court.

H. H. KIRKPATRICK,
Clerk.

9 WEDNESDAY, *October 30th*, 1889.

THE UNITED STATES,
v.
M. F. BALL, J. C. BALL, & R. E. BOUTWELL. } 3.

This cause coming on this day to be heard, came the United States by attorney, and announced ready for trial; and the defendants, M. F. Ball, J. C. Ball, and R. E. Boutwell, in their own proper persons and by attorneys, appeared and announced ready for trial, and thereupon, the motion of the defendants for a severance herein was denied and the defendants being arraigned plead not guilty, each and all of them, and thereupon came a jury of twelve good and lawful men, to wit: W. E. Hill, R. M. Miller, J. G. Oliver, Miles Yarborough, A. P. Ball, J. M. Allen, John Lyons, Dan Perry, Fred Nagel, Louis McDonald, W. D. Wasson, John Towns, who having been duly tried, empanneled, and sworn, as required by law, the hearing of the cause was proceeded with to the hour of adjournment, and the same not being concluded, the further hearing thereof was postponed until to-morrow.

THURSDAY, *October 31st*, 1889.

THE UNITED STATES,
v.
M. F. BALL, J. C. BALL, & R. E. BOUTWELL. } 3.

This day came the United States by her attorney, and the defendants in their own proper persons and by attorneys came, and the hearing of this cause was resumed before the court and jury, and the same not being concluded at the hour of adjournment, the further hearing thereof was continued until to-morrow morning.

10 FRIDAY, *November 1st*, 1889.

THE UNITED STATES
v.
M. F. BALL, J. C. BALL, & R. E. BOUTWELL. } 3.

This cause coming on further to be heard, came the United States by her attorney, and the defendants in their own proper persons and by attorneys came, and the hearing of this cause was resumed before the court and jury, and the same not being concluded at the hour of adjournment, the further hearing thereof was postponed until to-morrow.

SATURDAY, *November 2d*, 1889.

THE UNITED STATES
v.
M. F. BALL, J. C. BALL, & R. E. BOUTWELL. } 3.

This cause coming on further to be heard this day, came the United States by her attorney, and the defendants in their own proper persons and by attorneys came, and the hearing of this cause was resumed and the argument of counsel was concluded, and the jury having heard the evidence, the argument of counsel, and received the charge of the court, retired to consider of their verdict, and no verdict being returned at the hour of adjournment, no adjournment is had, and court will remain open for the receipt of the verdict herein.

11 We, the jury, find the defendants J. C. Ball & R. E. Boutwell guilty as charged in this indictment, and we find M. Filmore Ball not guilty. Nov. 3d, 1889.

A. P. BALL,
Foreman.

(Endorsed:) The United States, No. 3, *vs.* M. F. Ball & others. Verdict. Filed Nov. 3d, 1889. H. H. Kirkpatrick, clerk.

12 SUNDAY, *November 3rd*, 1889.

THE UNITED STATES
v.
M. F. BALL, J. C. BALL, & R. E. BOUTWELL. } 3.

This day came the United States by her attorney, and the defendants in their own proper persons and by attorneys came, and the jury of twelve good and lawful men which heretofore had been tried, empanneled, and sworn as required by law, and having heard the evidence and argument of counsel and received the charge of the court, and having on a former day of this term retired to consider of their verdict, on this day brought into open court their verdict in words and figures as follows, to wit:

"We, the jury, find the defendants J. C. Ball & R. E. Boutwell, guilty as charged in this indictment, and we find M. Filmore Ball not guilty. Nov. 3rd, 1889.

A. P. BALL, Foreman."

It is therefore considered by the court that the defendants J. C. Ball and R. E. Boutwell are guilty as charged in the indictment herein and as found by the jury, and it is ordered that they be remanded to the custody of the marshal and be by him committed to the county jail of Lamar County, to await the judgment and sentence of the court. It is further ordered that the defendant M. F. Ball be discharged and go hence without day.

13 In the circuit court of the United States for the fifth circuit, holding sessions at Paris, in the State and eastern district of Texas.

THE UNITED STATES
vs.
M. F. BALL, J. C. BALL, AND R. E. BOUTWELL. } # 3.

Be it remembered that upon trial of the above-entitled cause in the above-stated court on the 31st day of October, A. D. 1889, counsel for the prosecution attempted to prove by Overton Love, a witness summoned to testify in behalf of the Government, that he, the said Overton Love, heard W. T. Box, the deceased, say, on the Wednesday before he died, in the county court room at Ardmore, Chickasaw Nation, Indian country, to the county judge of Pickens County, Chickasaw Nation, Indian country, in the presence of R. E. Boutwell and in the absence of M. F. Ball, to whom his (Boxes) daughter was married, that Ball was living on his (Boxes) place in adultery with Boxes daughter, the said daughter (Ball's wife) having be*ing* married previous to her marriage to Ball to a white man in the United States. Counsel for the defense objected to this testimony by said witness for the reason that M. F. Ball was not present, and the testimony could not effect the def't Boutwell. The court overruled the objection and permitted the witness to testify; to which ruling of the court counsel for the defendants in *o*pen court excepted, and tender this their bill of exceptions, and pray that the same may be signed and made a part of the record in this cause this Oct. 31st, 1889.

J. C. HODGES,
GUTHRIDGE AND FLEMING,
FULSOM AND ELLIS,
Attorneys for Defendants.

The court admitted the testimony of C. J. Cornish, in which he said that in his presence, at the county court at Ardmore, Indian Territory,
14 Box, the deceased, informed and told Judge Duncan, of the county court, in the presence of Bob Boutwell, one of the defendants, that Filmore Cox, another of the defendants, was living on his Box place in adultery with his daughter, and told the judge other things in connection therewith, because the Government counsel said he would show that the language or statement used by Box about Filmore Ball was carried to and made known to Filmore Ball, which the counsel did do later in the examination of said Cornish Oct. 31.

ALECK BOARMAN, *Judge.*

(Endorsed:) # 3, C. C. The United States vs. M. F. Ball, John C. Ball, and R. E. Boutwell. Bill of exceptions, No. 1. Filed Nov. 15, 1889. H. H. Kirkpatrick, clerk.

15 In the circuit court of the United States for the fifth circuit, holding sessions at Paris, in the State and eastern district of Texas, October term, A. D. 1889.

THE UNITED STATES
vs.
J. C. BALL AND R. E. BOUTWELL. } # 3.

The defendants in the above-entitled cause moved the court for a new trial and to arrest the judgment, and suspend sentence upon the verdict of the jury rendered therein, and to set aside and vacate said verdict for the following reasons, to wit:

1st. Because the verdict of the jury is unsustained by proper and competent legal evidence and is consequently unauthorized by law.

2d. Because the court erred to the prejudice of the defendants, as shown by bill of exceptions No. 1.

3d. Because the court erred to the prejudice of the defendants in refusing to permit the wives of the defendants J. C. Ball and R. E. Boutwell to testify in favor of any or either or all of said defendants upon trial hereof, as shown by bill of exceptions No. 2.

4th. Because the court erred to the legal prejudice of the defendants by instructing the jury on the morning of the day upon which the verdict of the jury was returned that said jury should return a verdict upon said day, the same being Sunday, as shown by bill of exceptions No. 3.

5th. Because the defendants have good legal grounds to believe that since the verdict of the jury has been returned they and each of them
16 can now procure material evidence to their defence and to each of their defence, which evidence it was impossible for either of them to procure previous to their trial by reason of the legal complications surrounding them and each of them which will be of interest to the defendants and each of them at a subsequent trial of this cause, should the same be granted to them by this hon. court.

Wherefore the defendants, and each of them, pray judgment of this hon. court, as to whether or not they and each of them are entitled to a new trial by reason of each and all of these matters and things herein contained and presented, and will ever pray, &c., as in duty bound to do.

EDWARD GUTHRIDGE,
J. C. HODGES,
Counsel for Deft.

(Endorsed:) # 3. C. C. The United States vs. J. C. Ball and R. E. Boutwell. Motion for new trial, arrest of judgment, and suspension of sentence. Filed Nov. 15, 1889. H. H. Kirkpatrick, clerk. Guthridge and Hodges, deft. counsel.

17 In the circuit court of the United States for the eastern district of Texas, holding sessions at Paris, Texas.

THE UNITED STATES
vs.
M. F. BALL, JOHN BALL, & ROBERT BOUTwell.

And now comes the defendants, John Ball and Robert Boutwell, in their own proper person and by their attorneys, and being jointly indicted and

having been jointly tried in the above-entitled cause, here now jointly and each for himself, moves the court to arrest the judgment in said cause, and that this court proceed no farther with the same by pronouncing sentence upon these defendants, or either of them:

1st. Because they say the pretended verdict of the jury in this cause was returned into the room in which these defendants were tried on Sunday, the 3rd day of November, A. D. 1889, the same being the first day of the week, and a day dies non juridicus.

2nd. Because the Hon. Alex. Boarman, the judge who presided on the trial of said cause against these defendants, and who organized and empanneled the grand jury who found and returned the bill of indictment in this cause against these defendants and M. F. Ball for the murder of Box, the deceased, is judge of the district court of the United States for the western district of the State of Louisiana, and had no lawful authority and now has no lawful authority to set and preside as the judge of the circuit court and district court for the eastern district of Texas, holding sessions at Paris, Texas, because they say that the honorable Chauncey B. Sabin is the duly and legally appointed and qualified judge of the
18 said circuit court and district court of the United States for the eastern district of Texas, holding sessions at Paris, Texas, and the honorable Don A. Pardee is the duly and legally appointed and qualified judge of the circuit of the United States for the fifth judicial circuit of the United States, of which the said eastern district of Texas forms a part. And the said honorable Chauncey B. Sabin and the honorable Don A. Pardee are in no manner disqualified from holding these said offices or of having and performing these said duties as such judge as aforesaid. And these defendants say there is and was no satisfactory evidence shown to the said the honorable Don A. Pardee, judge of the fifth judicial circuit aforesaid, or to the justice of the Supreme Court of the United States allotted to the said circuit, that the said honorable Chauncey B. Sabin, the judge of the district court aforesaid, was or is disabled to hold a district court of the United States for the eastern district of Texas, holding sessions at Paris, Texas, begun and held in the city of Paris, in Lamar County, Texas, on the 14th day of October, A. D. 1889, or to perform the duties of his office, nor was there any application made in writing to the said circuit judge or justice by the district attorney or marshal of the eastern district of Texas, nor was there any order made in the nature of a certiorari directed to the clerk of the district court of the United States for the eastern district of Texas, holding its sessions at Paris, Texas, in said district, requiring him forthwith to certify into the then next circuit court to be held in said district all suits and process, civil and criminal, depending in said court and undertermined, with all the proceedings there-
19 on, and all the files and papers relating thereto, and no such order as aforesaid was ever published in any newspaper published in said eastern district of Texas or the said fifth judicial circuit aforesaid at least thirty days before the then next or any session of the said circuit court. Wherefore these defendants say the said actings and doings of the said the honorable Alex. Boarman, in organizing and empannelling the said grand jury who found and returned the bill of indictment in this cause, and who presided at the trial of this cause, and who organized, empanneled, and charged the pretended jury who found and returned the verdict in this

cause, are and were without lawful authority and are and were without lawful jurisdiction either of the person of these defendants or of the alleged offence of murder charged in the bill of indictment in this cause, and the same are null and void.

3rd, Because these defendants say the present term of the circuit court of the United States for the eastern district of Texas is & was at the date of their indictment and conviction in this cause presided over and held by the said the honorable Alexander Boarman, the judge who organized and empanneled the grand jury who found the bill of indictment in this cause against these defendants and their co-defendant, M. F. Ball, for the murder of one Box, and who presided at the trial of said cause at the present term of this court, and who organized and charged the jury who found and returned into court the pretended verdict against these defendants in this cause, is now and was on the 14th day of October, A. D. 1889, and prior thereto, the judge of the district court of the United States for the western district of Louisiana, and not the
20 judge of the district or circuit court of the United States for the eastern district of Texas, holding sessions at Paris, Texas, had no lawful authority to hold said circuit court at Paris, Texas, at a term thereof to be begun and held at Paris, Texas, on the 14th day of October, A. D. 1889, and to organize the said grand jury who found and returned the said bill of indictment aforesaid against these defendants and their said co-defendant, nor to organize or empannel or charge the said pretended jury who found and returned the said pretended verdict against these defendants, because they say the Hon. Chaucey B. Sabin is the duly & legally appointed and qualified judge of the district and circuit courts of the United States in and for the eastern district of Texas, including the said circuit court of the United States for the said eastern district of Texas, holding its sessions at Paris, and the Hon. Don A. Pardee is the duly and legally appointed and qualified judge of the circuit court of the fifth judicial circuit of the United States, of which the said eastern district of Texas and the said Paris, Texas, forms a part, and that there was no lawful proceedings had by which it is or was ascertained that the said the Hon. Chaucey B. Sabin is now or was on the 14th day of October, A. D. 1889, the time when this court began its session and organized and empanneled the grand jury aforesaid, prevented by any disability from holding the stated and appointed term by law of the circuit and district courts of the United States for the eastern district of Texas, holding its sessions at Paris, Texas, to be begun and held as required by law on the said 14th day of October, A. D. 1889, nor was such fact made to appear by the certificate of the clerk of said court or courts under the seal
21 of the court to the said the Hon. Don A. Pardee, judge of the circuit court aforesaid, or in his absence, to the circuit justice in which the said district aforesaid lie, nor was there any order of such judge or justice designating and appointing the said the Hon. Alex. Boarman, district & circuit judge aforesaid, to discharge all the judicial duties of the said the Hon. Chancey B. Sadin, judge of the district & circuit court of the United States for the eastern district of Texas, holding sessions at Paris or otherwise, nor was the said appointment filed in the clerk's office and entered on the minutes of the district court aforesaid in the said eastern district of Texas, and this defendants are ready to verify by the records of this court and the proceedings in this cause.

Wherefore these defendants say all the actings and doings of the said the Hon. Alex. Boarman, the said grand jury, and the said jury, are and were without lawful authority, and this court so organized and acting should proceed no farther to pronounce any judgement or sentence against these defendants; to all of which facts defendants are ready to make proof. Wherefore these defendants pray that they be discharged from costody so far as the proceedings of this court is concerned.

FLEMING & GUTHRIDGE,
HODGES, POLLARD & HODGES.

(Endorsed:) The United States *vs.* J. C. Ball & R. E. Boutwell. Motion in arrest and plea to jurisdiction. Filed Nov. 15, 1889.
H. H. KIRKPATRICK,
Clerk.

22 FRIDAY, *November 15th*, 1889.

THE UNITED STATES,
vs. } 3.
R. E. BOUTWELL & JOHN C. BALL.

The motion of the defendants for a new trial and in arrest of judgment herein coming on to be heard, because it is the opinion of the court that the law is against the motion, the same is overruled to which ruling of the court defendants excepted.

23 In U. S. circuit court eastern dist., Texas.

UNITED STATES
vs.
ROBT. E. BOUTWELL & JOHN C. BALL.

By reason of the law and the evidence and the verdict of the jury in this case, it is ordered and adjudged that the defendants, Robt. E. Boutwell and John C. Ball, be executed by being hung, until each and either are dead, according to the forms, delays, and processes provided in the laws of the United States.

This done and signed in open court Nov. 15, 1889.

ALECK BOARMAN,
Judge.

(Endorsed:) C. Cr. No. 3. The United States v. R. E. Boutwell & J. Ball. Filed Nov. 15, 1889. H. H. Kirkpatrick, clerk.

THE UNITED STATES,
vs. } 3.
R. E. BOUTWELL & JOHN C. BALL.

This day the defendants in open court excepted to the sentence of the court this day pronounced upon them.

24 In the circuit court of the United States for the eastern district of Texas, holding sessions at Paris, Texas.

THE UNITED STATES
vs.
JOHN BALL AND ROBERT BOUTWELL.

Be it remembered that on the 15 day of November, A. D. 1889, in the above-entitled cause, came on to be heard the motion of the defendants, John Ball and Robert Boutwell, in arrest of judgment herein, and the same being read, the court stated that such an order assigning & appointing the Hon. Aleck Boarman to hold the circuit & district courts referred to in said motion and had been made, and was entered on the minutes of the district and circuit courts of the United States for the eastern district of Texas, at Galveston, in the State of Texas, and thereupon overruled said motion; to which rulings and judgments of the court in overruling said motion in arrest of judgment, said defendants then and there in open court exepteed, and here now tender this their bill of exceptions, and pray that the same may be signed by the court and made a part of the record of this cause, which is accordingly done and so ordered. Witness my hand this —— day of November, A. D. 1889.

On the trial of the motion to arrest the judgment and sentence in this case the court did not refuse the defendants an opportunity of showing by evidence that the order designating myself as the judge to hold this term of the court in place of Judge Sabin, was not of record at Paris, Texas. The court, not prohibiting them from tendering evidence on that point, said it was known to the court that a proper order authorizing this
24 judge to hold the terms of court in the district and circuit court of the eastern dist in Texas, fifth circuit, was executed, signed, and properly recorded at Galveston, Texas, which is one of the places for holding courts in the eastern district. The court further held as above, because if it had been proved that such an order was not on record in the clerk's office at Paris, it would have had no weight in considering the allegations in the motion for arrest, because the order to the knowledge of the judge had been properly issued and was duly recorded or entered at Galveston in accordance with his instructions.

ALECK BOARMAN,
U. S. Judge.

(Endorsed:) No. . In the circuit court of the U. S. for ca tern dist. of Texas, at Paris. The United States vs. John Ball & Rob't Boutwell. Deft's bill of exceptions. Filed Nov. 22, 1889. H. H. Kirkpatrick, clerk.

26 In the circuit court of the United States, eastern district of Texas, sitting and holding its session at Paris, Lamar County, Texas.

THE UNITED STATES
vs.
JOHN C. BALL AND ROBERT E. BOUTWELL. } No. 3.

Now comes the United States, by Joseph H. Wilson, United States attorney, and shows to the honorable court that heretofore, to wit, on the fifteenth day of November, in the year of our Lord eighteen hundred and

eighty-nine, John C. Ball and Robert E. Boutwell were sentenced by this honorable court to be hanged until dead for the crime of murder, of which crime said Ball and Boutwell have been found guilty after trial by a jury. That no appeal from said sentence has been perfected by said John C. Ball and Robert E. Boutwell, or either of them; and the United States, by Joseph H. Wilson, United States attorney, moves and prays that this honorable court will fix a day upon which said John C. Ball and Robert E. Boutwell, the defendants in the above numbered and entitled cause, be executed; and as in duty, &c.

THE UNITED STATES.
By JOSEPH H. WILSON,
United States Attorney.

(Endorsed:) 3. In circuit court. The United States vs. Jno. C. Ball & Robert E. Boutwell. Motion of U. S. to fix day for execution. Filed May 5, 1890. H. H. Kirkpatrick, clerk. J. H. Wilson, U. S. att'y.

27 THE UNITED STATES *vs.* JOHN C. BALL. } 3.

This day came the United States, by the United States attorney, and the defendant in his own proper person and by attorney appeared, and the United States attorney moved the court to fix a day of execution of the defendant, John C. Ball. And it appearing to the court that on the 15th day of November, 1889, during a former term of this court, the sentence of death was pronounced upon the defendant, John C. Ball, for the crime of murder, in compliance with the law and the verdict of the jury rendered at that term of the court, to wit, on the third day of November, 1889, and that no petition for writ of error to the Supreme Court of the United States has been filed with the clerk of this court, and no other proper proceedings for a revision of the finding herein by the Supreme Court of the United States have been begun: It is therefore ordered, adjudged, and decreed by the court that the defendant John C. Ball be now remanded to the custody of the marshal, to be by him kept securely confined in the jail of Lamar County, Texas, until Friday, the 19th day of December, 1890, when he shall be taken therefrom by the marshal, and between the hours of 12 o'clock m. and 4 o'clock p. m. of said 19th day of December, 1890, be hanged by the neck until he, the said John C. Ball, is dead, and the clerk of this court is ordered to issue a death warrant in accordance with this sentence, and deliver the same to the marshal, who shall execute the same according to law. Done in open court, July 18, 1890.

DAVID E. BRYANT,
Judge.

(Endorsed:) No. 3. The United States v. John C. Ball. Filed July 19, 1890. H. H. Kirkpatrick, clerk. Sentence.

28 THE UNITED STATES *vs.* ROBT. E. BOUTWELL. } 3.

This day came the United States by the United States attorney, and the defendant in his own proper person and by attorney appeared, and the United

States attorney moved the court to fix the day of execution of the defendant Robt. E. Boutwell. And it appearing to the court that on the 15th day of November, 1889, during a former term of this court, the sentence of death was pronounced upon the defendant, Robt. E. Boutwell, for the crime of murder, in compliance with the law and the verdict of the jury rendered at that term of court, to wit, on the third day of November 1889, and that no petition for writ of error to the Supreme Court of the United States has been filed with the clerk of this court, and no other proper proceedings for a revision of the findings herein by the Supreme Court of the United States have been begun: It is therefore ordered, adjudged, and decreed by the court that the defendant, Robt. E. Boutwell, be now remanded to the custody of the marshal, to be by him kept securely confined in the jail of Lamar County, Texas, until Friday, the 19th day of December, 1890, when he shall be taken therefrom by the marshal, and between the hours of 10 o'clock a. m. and 4 o'clock p. m. of said 19th day of December, 1890, be hanged by the neck until he, the said Robt. E. Boutwell, is dead, and the clerk of this court is ordered to issue a death warrant in accordance with the sentence, and deliver the same to the marshal, who shall execute the same according to law. Done in open court July 18, 1890.

DAVID E. BRYANT,
Judge.

(Endorsed) No. 3. The United States v. Robt. E. Boutwell. Sentence filed July 19, 1890. H. H. Kirkpatrick, clerk.

29 In the circuit court of the United States, at Paris, Texas, July 18th, 1890.

THE UNITED STATES, *vs.* JOHN BALL. } No. 3. Murder.

Be it remembered that on this day defendant was brought into court before Hon. D. E. Bryant, district judge of the eastern district of Texas, in compliance with a motion filed by Hon. Joseph H. Wilson, U. S. attorney, on the 5th day of May 1890, when Hon. Alex. Boarman presided, which motion is as follows:

30 In the circuit court of the United States, eastern district of Texas, sitting and holding its session at Paris, Lamar County, Texas.

THE UNITED STATES *vs.* JOHN C. BALL AND ROBERT E. BOUTWELL. } No. 3.

Now comes the United States, by Joseph H. Wilson, United States attorney, and shows to the honorable court that heretofore, to wit, on the fifteenth day of November, in the year of our Lord eighteen hundred and eighty-nine, John C. Ball and Robert E. Boutwell were sentenced by this honorable court to be hanged until dead for the crime of murder, of which crime said Ball and Boutwell had been found guilty after a trial by a jury.

That no appeal from said sentence has been perfected by said John C. Ball and Robert E. Boutwell, or either of them, and the United States, by Joseph H. Wilson, United States attorney, moves and prays that this honorable court will fix a day upon which said John C. Ball and Robert E. Boutwell, the defendants in the above numbered and enititled cause, be executed, and as in duty, &c.

THE UNITED STATES,
By JOSEPH H. WILSON,
United States Attorney.

(Endorsed:) 3. In the circuit court. The United States vs. John C. Ball & Robert E. Boutwell. Motion of U. S. to fix day for execution. Filed May 5, 1890. H. H. Kirkpatrick, clerk. J. H. Wilson, U. S. atty.

31 And thereupon defendant filed his motion in arrest of further proceedings and to vacate and set aside the orders and proceedings against defendant in said court heretofore, which motion is as follows:

In the circuit court of the United States, at Paris, Texas, eastern district of Texas, July , 1890.

THE UNITED STATES *vs.* JOHN BALL ET AL. } No. 3. Murder.

Now comes John Ball in open court, in custody of the marshal of said eastern district of Texas, and in person and by counsel moves the court to set aside the judgment heretofore entered on the 15th day of Nov., 1889, and to vacate proceedings in said case, and to examine from the beginning the charge of murder made against him, and for cause therefor your petitioner, John Ball, says:

1st. He was held to answer jointly with two others for a capital crime, to wit, murder, alleged to have been committed in Pickens County, Chickasaw Nation, Indian Territory, and no indictment charging him jointly with said other persons named in said indictment was found and returned into court by a grand jury legally summoned and qualified, because he avers that the grand jury that found and returned the bill of indictment in this case against this defendant charging him jointly with one Robert E. Boutwell and one M. Filmore Ball with the murder of one W. T. Box was not organized, empaneled, sworn, and charged by any judge of the circuit court of the United States having authority under the Constitution and laws of the United States to hold a circuit court in Paris, Texas, and said grand jury was assembled, organized, and permitted to act without authority of law.

32 2nd. The grand jury that returned the bill of indictment into court against defendant was empaneled, charged by, and sworn before one Aleck Boarman, who was at the time said bill was returned, and now is, the legally appointed and duly qualified and recognized judge of the western district of the State of Louisiana, and he was not then and is not now the district judge of the eastern district of Texas, and he had

no lawful authority to open, hold, and conduct and preside over a circuit court of the United States at Paris, Texas, because at said time the Hon. Chauney B. Sabin was judge of said district, and there was no lawful order appointing and designating said Hon. Alex Boarman to hold a district and circuit court at Paris, Texas, entered of record at Paris, Texas, on the minutes and record of said court, and this defendant will verify by the records of said courts. Defendant further says there was no order upon application in the nature of a certiorari requiring the clerk of the district court of the United States for the eastern district of Texas, at Paris, Texas, to certify into the then next circuit court of the United States for the eastern district of Texas, at Paris, Texas, the suits and proceedings, civil and criminal, pending therein, and especially was there no such order of the circuit judge of the fifth judicial circuit of the United States, the Hon. Don. A. Pardee, nor of any justice of the Supreme Court of the United States allotted to said circuit to certify into said court any suit or proceeding, civil or criminal, especially the proceedings in this cause, to any circuit court of the United States, nor was any such order published in this district as required by law.

33 3d. Because this defendant has not been tried before a judge having authority to preside over a court at Paris, Texas. The Hon. Alex Boarman district judge of the United States for the western district of Louisiana, and was not, and is not a judge of the United States for any district in the State of Texas, and there was no order made and entered upon the minutes of this court at Paris, Texas, by the Circuit Judge of the United States at Paris, Texas, nor by any justice of the Supreme Court of the United States designating and giving legal authority to the said Alex Boarman, the judge presiding at the trial of the defendant, to hold a district and circuit court of the United States in the eastern district of Texas, at Paris, Texas, during a regular term of said court by reason of any disability of Hon. Chauncey B. Sabin, who was at said time the legally qualified judge of the eastern district. Nor was there any order upon application in the nature of a certiorari requiring the clerk of the district court of the United States for the eastern district of Texas to certify into the then next circuit court of the United States to be held in said district any suit or proceeding, civil or criminals, pending in said district court in the manner required by law.

4th. No legal verdict was found and returned into court in this case because no judge presided at the trial having legal authority to hold court, as appears of record herein, and no legal judgment was ever rendered against this defendant, and in support of this allegation defendant refers to the record herein; no legal judgment has been enteded against defendant, because he says that in every criminal case in which two or more

34 persons are jointly tried there must be as to each and every defendant a seperate judgment as to him affixing to said seperate and individual judgment the punishment fixed by the laws of the United States.

5th. The court erred in said trial in this: defendants moved for a severance from co-defendants; the court, as appears in the record herein, overruled said motion, and this defendant, against his demand, was forced to trial with two others, viz, M. Filmore Ball and Robert E. Boutwell, and on said trial the jury found a verdict finding this defendant and R. E. Boutwell guilty and M. F. Ball not guilty, thus showing that a severance should have been granted in said case.

6th. Because this court has no legal authority under the facts appearing of record in this court to execute an order, judgment or decree made by Hon. Alex. Boardman, judge of the western district of Louisiana, who, presided on the trial of this cause.

JOHN BALL,

By his attorneys,

HODGES & POLLARD & F. W. MINER.

(Endorsed:) The United States *vs.* John Ball *et al.* Murder. No. 3, C. C. Motion to vacate and set aside proceedings in said case. Filed July 18, 1890. H. H. Kirkpatrick, clerk.

35 And in support of said motion defendant, by counsel, introduced the judgment entered by Hon. Alex. Boarman on the third day of November, 1889, which is as follows:

"THE UNITED STATES
vs.
F. M. BALL, J. C. BALL, & R. E. BOUTWELL. } 3.

This day came the United States, by her attorney, and the defendants in their own proper persons and by attorneys came, and the jury of twelve good and lawful men which heretofore had been tried, empaneled, and sworn as required by law, and having heard the evidence and argument of counsel and received the charge of the court, and having on a former day of this term retired to consider of their verdict, on this day brought into open court their verdict in words and figures as follows, to wit:

"We, the jury, find the defendants, J. C. Ball & R. E. Boutwell, guilty as charged in this indictment, and we find M. Filmore Ball not guilty. Nov. 3rd, 1889. A. P. Ball, Foreman."

It is therefore considered by the court that the defendants, J. C. Ball and R. E. Boutwell, are guilty as charged in the indictment herein and as found by the jury, and it is ordered that they be remanded to the custody of the marshal and be by him commit'ed to the county jail of Lamar County to await the judgment and sentence of the court. It is further ordered that the defendant M. F. Ball be discharged and go hence without day.

And the sentence entered Nov. 15th, 1889, which is as follows:

36 In U. S. circuit court, eastern dist., Texas.

UNITED STATES
vs.
BOB'T E. BOUTWELL & JOHN C. BALL. } 3

By reason of the law and the evidence and the verdict of the jury in this case, it is ordered and adjudged that the defendants Rob't E. Boutwell and John C. Ball be executed by being hung until each and either are dead, according to the forms, delays, and processes provided in the laws of the United States. This done and signed in open court Nov. 15, 1889.

ALECK BOARMAN, *Judge.*"

And then defendant offered and proposed to prove by the clerk that no order was entered nor is any of record on the minutes of this court or of the district court at this place showing the appointment of Hon. Alex. Boarman to hold court at Paris, Texas, which evidence the court refused to admit or hear, because there was found among the papers on file in said cause a statement on a bill of exceptions signed by Hon. Alex. Boarman stating in effect that his appointment to hold court was filed and entered at Galveston, which paper reads as follows, to wit:

"On the trial of the motion to arrest the judgment and sentence is this case, the court did not refuse the defendants an opportunity of showing by evidence that the order designating myself as the judge to hold this term of the court in place of Judge Sabin was not of record at Paris, Texas.

37 The court, not prohibiting them from tendering evidence on that point, said it was known to the court that a proper order authorizing this judge to hold the terms of court in the district and circuit court of the eastern dist. in Texas, fifth circuit, was executed, signed, and properly recorded at Galveston, Texas, which is one of the places for holding court in the eastern district. The court further held as above because if it had been found that such an order was not on record in the clerk's office at Paris it would have had no weight in considering the allegations in the motion for arrest, because the order to the knowledge of the judge had been properly issued and was duly recorded or entered at Galveston in accordance with his instructions.

ALECK BOARMAN, *U. S. Judge.*"

After which, the court having heard and duly considered said motion, in connection with the record and all the papers in said cause, overruled defendant's motion herein, and proceeded to fix the day for the execution of the sentence of death, and ordered the same to be carried out by the marshal on the 19th day of December, 1890. And to the ruling of the court on defendant's motion and to the action of the court in ordering the execution of the sentence of death upon defendant, the defendant here excepts upon grounds stated in motion herein, and tenders his bill of exceptions, and prays that the same be allowed, signed, and filed, and made a part of the record in this case against defendant.

This bill of exceptions presented & allowed in open court on July 19, 1890. Witness my hand & official signature the date & day above stated.

DAVID E. BRYANT, *Judge.*

(Endorsed:) No. 3 C. C. The United States *vs.* John Ball. Bill of exceptions. Filed July 19, 1890. H. H. Kirkpatrick, clerk.

38 In the circuit court of the United States, at Paris, Texas, July 18th, 1890.

THE UNITED STATES *vs.* Robert E. Boutwell. } No. 3. Murder.

Be it remembered that on this day defendant was brought into court before Hon. D. E. Bryant, judge of the eastern district of Texas, in com-

pliance with a motion filed by Hon. Joseph H. Wilson, U. S. Attorney on the 5th day of May, 1890, which motion is as follows:

In the circuit court of the United States, Eastern District of Texas, sitting and holding its sessions at Paris, Lamar County, Texas.

39 THE UNITED STATES.
vs
JOHN C. BALL AND ROBERT E. BOUTWELL. } No. 3.

Now comes the United States, by Joseph H. Wilson, United States attorney, and shows to the honorable court that heretofore, to wit. on the fifteenth day of November, in the year of our Lord eighteen hundred and eighty-nine, John C. Ball and Robert E. Boutwell were sentenced by this honorable court to be hanged until dead for the crime of murder, of which crime said Ball and Boutwell had been found guilty after trial by jury. That no appeal from said sentence has been perfected by said John C. Ball and Robert E. Boutwell or either of them; and the United States, by Joseph H. Wilson, United States attorney, moves and prays that this honorable court will fix a day upon which said John C. Ball and Robert E. Boutwell, the defendant in the above numbered and entitled cause, be executed; and as in duty, &c.

THE UNITED STATES,
By JOSEPH H. WILSON,
United States Attorney.

(Endorsed:) 3. In circuit court. The United States vs. Jno C. Ball & Robert E. Boutwell. Motion of U. S. to fix day for execution. Filed May 5, 1890. H. H. Kirkpatrick, clerk. J. H. Wilson, U. S. att'y.

40 And thereupon defendant filed his motion in arrest of further proceedings and to vacate and set aside the orders and proceedings against defendant in said court heretofore, which motion is as follows:

41 In the circuit court of the United States, July , 1890.

THE UNITED STATES
vs.
ROBERT E. BOUTWELL ET AL. } Murder.

Now comes Robt. E. Boutwell, in open court, in custody of the marshal of the eastern district of Texas, and in person and by counsel moves the court to set aside the judgment heretofore entered on the 15th day of November, 1889, and to vacate and annul all proceedings in said case except the proceedings before the United States Commissioner and the commitment based thereon; and for cause therefor your petitioner, Robert E. Boutwell, says:

1st. Your petitioner was held jointly with one M. Filmore Ball and one John Ball to answer to the charge of murder alleged to have been committed in Pickins County, Chicasaw Nation, Indian Territory, and within the jurisdiction of the circuit court to be held at Paris, Texas; but your petitioner avers and charges that no legal indictment charging him

jointly with said M. Filmore Ball and John Ball was found and returned into court by a grand jury legally summoned and qualified, because he avers that the body of men who returned into court before Hon. Alex. Boarman a bill charging your petitioner jointly with M. Filmore Ball and John Ball with the murder of one W. T. Box was not organized nor empaneled nor sworn before, nor charged by any judge of the circuit court of the United States having authority under the Constitution and laws of the United States to hold a circuit court in Paris, Texas, and said
42 grand jury was assembled, organized, and permitted to act without legal authority.

2nd. The body of men whose foreman returned a bill against petitioner and his codefendants was empaneled and charged by Hon. Alex. Boarman, who was at the time, and now is, the duly appointed and qualified judge of the district court in and for the western district of Louisiana, and was not then, and is not now, judge of the eastern district of Texas, and had no lawful authority to hold court in Paris, Texas, because at said time Hon. Chauncey B. Sabine was judge of the eastern district of Texas, and there was no lawful order appointing and designating Hon. Alex. Boarman to hold a district and circuit court of the United States at Paris, Texas, made and entered of record on the minutes and records of said courts; and this defendant will verify by the minutes of said courts. Petitioner further says that there was never made nor filed an order in the nature of a certiorari, requiring the clerk of the district court of the United States for the eastern district of Texas, at Paris, Texas, to certify into the then next circuit court of the United States for the eastern district of Texas, at Paris, Texas, the *the* suits and proceedings, civil and criminal, pending therein; and especially was there no such order of the circuit judge of the fifth judicial circuit of the United States, the Hon. Don A. Pardee, nor of any justice of the Supreme Court of the United States, allotted to said circuit, to certify into said court any suit or proceeding, civil or criminal, especially the proceedings in this cause, to any circuit court of the United States, nor was any such order published in this district, as required by law.

43 3d. Because your petitioner was not tried before a judge having legal authority to preside over a circuit court at Paris, Texas, the Hon. Alex. Boarman, who was and is the district judge of the United States within and for the western district of Louisiana, but was not and is not a judge of any district in the State of Texas, and there was no order made and entered upon the minutes of this court at Paris, Texas, by the circuit judge of this circuit, nor by any justice of the Supreme Court of the United States, giving any authority to Hon. Alex. Boarman, who presided on the trial of petitioner, to hold a district and circuit court of the United States at Paris, Texas, during a regular term of said court by reason of any disability of the Hon. Chauncey B. Sabin, who was at said time the legally qualified judge of the eastern district of Texas. Nor was there any order upon application in the nature of a certiorari requiring the clerk of the district court of the United States for the eastern district of Texas at Paris, Texas, to certify into the then next circuit court of the United States, to be held in said district, any suit or proceeding, civil or criminal, depending in said district or circuit court in the manner required by law.

4th. No legal verdict was ever found and returned into court against petitioner, because the judge presiding at the trial, the Hon. Alex. Boarman, had no legal and constitutional authority to hold any court in Paris, Texas, as appears by the records herein, and there was no legal judgment ever rendered against this defendant, and in support of his allega-
44 tion he refers to the record. He charges that no legal judgment has been rendered against him, because he avers that in every criminal case in the courts of the United States in which two or more persons are jointly tried, the law requires as to each defendant a seperate judgment, and a judgment against each defendant seperately such punishment as may be lawfully inflicted under the counstitution and laws of the United States.

5th. The court trying said case erred in this: Your petitioner moved for a severance from his codefendants, M. Filmore Ball and John Ball, and the motion for a severance was overruled and on said trial M. Filmore Ball was found not guilty, and your petitioner and one John Ball found guilty. Jointly and against them all a joint judgment was entered, and the finding and verdict of the jury proves that a severance should have been granted.

6th. Petitioner says that the judge now presiding has no legal authority to take any action against the consent of petitioner, because the facts now appearing of record in said court show that he has no legal authority to execute any order, judgment, or decree made by Hon. Alex. Boarman, judge of the western district of Louisiana, who presided at the fall term, 1889, on the trial of this cause.

ROBERT E. BOUTWELL.
(*By his Attorneys,*)
HODGES & POLLARD & FRED W. MINER.

45 (Endorsed.) No. 3, C. C. The United States *vs.* R. E. Boutwell, et al. Murder. Motion to vacate and set aside all orders and proceedings in this case in the circuit court. Filed July 18, 1890. H. H. Kirkpatrick, clerk.

46 And and in support of said motion defendent by counsel introduced the judgment entered by Hon. Alex. Boarman on the third day of November, 1889, which is as follows:

THE UNITED STATES,
" *v.* } 3.
" M. F. BALL, J. C. BALL, & R. E. BOUTWELL.

" This day came the United States by her attorney, and the defendants in their own proper persons and by attorneys came, and the jury of twelve good and lawful men which heretofore had been tried, empaneled, and sworn, as required by law, and having heard the evidence and argument of counsel and received the charge of the court, and having on a former day of this term retired to consider of their verdict, on this day brought into open court their verdict in words and figures as follows, to-wit:

" ' We, the jury, find the defendants, J. C. Ball & R. E. Boutwell, guilty as charged in this indictment, and we find M. Filmore Ball not guilty, Nov. 3rd, 1889. A. P. Ball, foreman.' It is therefore considered by the court that the defendants J. C. Ball and R. E. Boutwell are guilty, as charged in the indictment herein, and as found by the jury, and it is ordered that

they be remanded to the custody of the marshal and be by him committed to the county jail, of Lamar County, to await the judgment and sentence of the court. It is further ordered that the defendant, M. F. Ball, be discharged and go hence without day."

And the sentence entered Nov. 15th, 1889, which is as follows:

47 "In the U. S. circuit court, eastern dist., Texas.

"UNITED STATES,
"*vs.* } 3.
"ROBT. E. BOUTWELL & JOHN C. BALL.

"By reason of the law and the evidence, and the verdict of the jury in this case, it is ordered and adjudged that the defendants, Robt. E. Boutwell and John C. Ball, be executed by being hung until each and either are dead, according to the forms, delays, and processes provided in the laws of the United States. This done and signed in open court Nov. 15, 1889.

"ALEX. BOARMAN, *Judge.*"

And proposed to prove by the clerk that no order was entered of record on the minutes of this court showing the appointment of Hon. Alex. Boarman to hold said court, which evidence the court refused to admit and hear because there is in the papers a statement endorsed on a bill of exceptions and signed by Hon. Alex. Boarman, stating in effect that his appointment was filed and entered at Galveston, which paper reads as follows:

"On the trial of the motion to arrest the judgment and sentence in this case the court did not refuse the defendants an opportunity of showing by evidence that the order designating myself as the judge to hold this term of the court in place of Judge Sabin was not of record at Paris, Texas. The court not prohibiting them from tendering evidence on that point said it was known to the court that a proper order authorizing this
48 judge to hold the terms of court in the district and circuit court of the eastern dist. in Texas, fifth circuit, was executed, signed, and properly recorded at Galveston, Texas, which is one of the places for holding court in the eastern district. The court further held as above, because if it had been found that such an order was not on record in the clerk's office at Paris it would have had no weight in considering the allegations in the motion for arrest, because the order, to the knowledge of the judge, had been properly issued, and was duly recorded, or entered, at Galveston, in accordance with his instructions.

"ALECK BOARMAN, *U. S. Judge.*"

And the court having heard and considered said motion, in connection with the record and all the papers in said cause, overruled said motion and proceeded to fix the day for the execution of defendant, and ordered that he be executed on the 19th day of December, 1890. And to the ruling and action of the court defendant excepts, upon the grounds stated in said motion, and here tenders his bill of exceptions and prays that the same may be signed and made a part of the record herein.

This bill of exceptions presented and allowed in open court this July 19, A. D. 1890.

Witness my hand & official signature the day and date above written.

DAVID E. BRYANT, *Judge.*

(Endorsed:) No. 3, C. C. The United States vs. Robert E. Boutwell. Bill of exceptions. Filed July 19, 1890. H. H. Kirkpatrick, clerk.

49 THE UNITED STATES } No. 3.
vs.
R. E. BOUTWELL. }

Defendant moves the court to enter an order allowing sixty days within which to apply for a writ of error to the Supreme Court.

HODGES & POLLARD AND F. W. MINER,
For Deft.

(Endorsed:) No. 3 C. C. The United States vs. R. E. Boutwell. Motion for 60 days' time to apply for writ of error. Filed July 18, 1890. H. H. Kirkpatrick, clerk.

THE UNITED STATES } No. 3.
vs.
JOHN BALL. }

Defendant moves the court to enter an order allowing sixty days within to sue out a writ of error to the Supreme Court.

HODGES & POLLARD AND F. W. MINER,
For Deft.

(Endorsed:) No. 3, C. C. The United States vs. John Ball. Motion for 60 days' time within which to apply for writ of error. Filed July 18, 1890. H. H. Kirkpatrick, clerk.

50 FRIDAY, *July 18th*, 1890.

THE UNITED STATES } 3.
v.
JOHN C. BALL. }

This day the defendant in open court excepted to the action of the court in fixing the day of execution of the defendant herein and tendered his bill of exceptions.

THE UNITED STATES } 3.
v.
JOHN BALL. }

Sixty days allowed defendant in which to file petition for writ of error.

THE UNITED STATES } 3.
v.
R. E. BOUTWELL. }

This day the defendant in open court excepted to the action of the court in fixing the day of execution of the defendant herein and tendered his bill of exceptions.

THE UNITED STATES } 3.
v.
R. E. BOUTWELL. }

Sixty days allowed defendant in which to file petition for writ of error.

51 In the circuit court of the United States, fifth circuit and eastern district of Texas.

To the honorable Chief Justice and associate justice of the Supreme court of the United States.

John C. Ball and Robert E. Boutwell, citizens of the United States and residents of the Chickasaw Nation, Indian Territory, respectfully represent, that on the 29th day of May, 1889, they and one M. Filmore Ball, were arrested in said Chickasaw Nation, carried from there to Paris, Texas, and confined in the county jail of Lamar County, Texas, in which county Paris is situated, and charged with having committed the crime of murder; that on the 17th day of October, 1889, a bill of indictment charging petitioners, jointly with one M. Filmore Ball, with murder was returned into court presided over and held by Hon. Aleck Boarman, district judge of the western district of Louisiana, and on said indictment said three defendants were put on their trial, and afterwards, to wit, on the 3rd day of November, 1889, the jury selected to try said cause returned into court a verdict finding M. Filmore Ball not guilty and your petitioners guilty as charged in the said bill of indictment, and on the 15th day of November, 1889, Hon. Aleck Boarman pronounced or filed and entered sentence of death upon petitioners, but did not fix any date for the execution thereof; that at the spring term of said court, on the 18th day of July, 1890, Hon. David E. Bryant, judge of the eastern district of Texas, proceeded to sentence petitioners to be executed on the 19th day of December, 1890, and remanded your petitioners to jail to remain until said date.

52 Your petitioners allege that in the trial and proceedings in said cause great and manifest errors were committed, which will appear upon inspection of the record in said case; that they have not had a fair and impartial trial by a court having legal jurisdiction over them; that they have not been convicted by "due process of law."

Therefore your petitioners pray for a writ of error to be directed to the clerk of the circuit court at Paris, Texas, directing him to "transmit a true copy of the record and all proceedings in the cause under his hand and the seal of the court."

JOHN C. BALL & ROBERT E. BOUTWELL,
By FREDERICK W. MINER AND HODGES & POLLARD,
Attorneys for Petitioners.

Writ allowed without bond for costs, and clerk will issue writ forthwith as herein prayed. Done this Sept. 9th A. D. 1890.

DAVID E. BRYANT, *Judge.*

(Endorsed:) The United States *vs.* John C. Ball & Robert E. Boutwell. No. 3, C. C. Murder. Petition for writ of error. Filed Aug. 22, 1890. H. H. Kirkpatrick, Clerk.

53 In the circuit court of the United States of America for the eastern district of Texas, in the fifth circuit, at Paris, Texas.

THE UNITED STATES
vs.
M. F. BALL, J. C. BALL, ROBERT E. Boutwell. } C. C. No. 3. Murder in I. T.

Now comes John C. Ball and Robert E. Boutwell, two of the respondents in the above styled and numbered cause, and complaining of the trial, judgment, proceedings, and sentence in said cause, say that they have been tried and convicted without due process of the law of the land; that they have been deprived of their liberty without due process of law, and are now under sentence to be deprived of life with due process of law. Your respondents, John C. Ball and Robert E. Boutwell, allege that in their trial and conviction great and manifest errors to the injury of respondents were committed, which they specify as follows:

1st. Because no legal indictment was returned into court against respondents. The bill of indictment, upon which respondents were tried, was returned into court October 17th, 1889, and charges that M. F. Ball, J. C. Ball, and R. E. Boutwell did on the 26th day of June, 1889, make an assault upon one William T. Box with a shot-gun, and inflict mortal wounds, of which mortal wounds the said William T. Box did languish and languishing did die, but nowhere alleges when and where said William T. Box died.

2nd. The court erred in overruling the motion of defendants for a new trial and arrest of judgment against them, said judgment rendered and entered on the 15th day of November, 1889, because prior to the
54 trial of said cause, to wit, on the 30th day of October, 1889, the court overruled the motion of defendants for a severance in said cause, and the court, Hon. Alex Boarman presiding, after denying said motion for a severance, forced all *all* of said defendants to be tried jointly, to wit, M. F. Ball, J. C. Ball, and R. E. Boutwell, and the jury, after hearing the evidence, arguments, and charge of the court, on Saturday, November 2nd, 1889, retired to consider the case, and on Sunday, November 3rd, 1889, came into court and returned the following verdict in writing: "We, the jury, find the defendants, J. C. Ball & R. E. Boutwell, guilty as charged in this indictment, and we find M. Fillmore Ball not guilty. Nov. 3rd, 1889. A. P. Ball, foreman." All of which appears of record, and these defendants, your respondents, J. C. Ball and R. E. Boutwell, respectfully urge that the result in this case shows that the court erred in denying defendants' motion for a severance in said cause, to their manifest injury, as the result shows that had M. Filmore Ball been first tried and acquitted he might have been a witness on the trial of these defendants.

3rd. Assignment of error: The court erred in entering a joint judgment in said cause against your respondents and in entering a joint sentence of death thereon, and said judgment and sentence is not entered according to law, and the motion of defendants in arrest of judgment should have been granted herein, which said motion was filed and overruled Nov. 15th, 1889.

4th. The court, Hon. D. E. Bryant, district judge presiding, on the

18th day of July, 1890, proceeded to order the sentence of death
55 executed upon defendants, and fixed the day for the execution on the 19th day of December, 1890, and on said day, July 18th, 1890, overruled the motions filed by each of your respondents to vacate and set aside proceedings therein, which said motions and the grounds therefor fully appear in the bill of exceptions filed herein on July 19th, 1890.

5th. Asssignment of error: The trial court, Hon. Alex. Boarman, erred in refusing to allow the wives of these respondents, J. C. Ball and R. E. Boutwell, to testify in said cause as set forth in "motion for new trial, arrest of judgment, and sentence," filed November 15th, 1889, which grounds is stated in paragraph third of said motion, as follows: "Because the court erred to the prejudice of the defendants in refusing to permit the wives of the defendants, J. C. Ball and R. E. Boutwell, to testify in favor of any or either or all of said defendants upon trial hereof as shown by bill of exceptions No. 2," and your respondents respectfully urge that there is now no recognized rule of law which prevents the wife from testifying in behalf of her husband, since even the defendants have been made competent witnesses, and they propose to prove by said witnesses an alibi upon said trial.

6th. Assignment of error: Because there is no record in the circuit or district court at Paris, Texas, showing that Hon. Alex. Boarman, judge of the district court of the United States for the western district of Louisiana, was ever designated, appointed, and authorized to hold the circuit court at Paris, Texas, and the only evidence found at Paris is an endorsement on a bill of exceptions filed Nov. 22nd, 1889, which bill of exceptions is as follows:

56 "The United States vs. John Ball and Robert Boutwell, in the circuit court of the United States for the eastern district of Texas, at Paris, Texas. Be it remembered, that on the 15th day of November, A. D. 1889, *im* the above-entitled cause, came on to be heard the motions of the defendant, John Ball and Robert Boutwell, in arrest of judgment herein, and the same being read the court stated that such an order, assigning, and appointing the Hon. Alex. Boarman to hold the circuit and district courts referred to in said motion, had been made and was entered in the minutes of the district and circuit courts of the United States for the eastern district of Texas, at Galveston, in the State of Texas, and thereupon overruled the said motions, to which rulings and judgment of the court in overruling said motions in arrest of judgment said defendants then and there in open court excepted, and here now tender this their bill of exceptions and pray that the same may be signed by the court and made a part of the record in this cause, which is accordingly done and so ordered.

"Witness my hand this day of November, A. D. 1889."

(Endorsed:) "On the trial of the motion to arrest the judgment and sentence in this case the court did not refuse the defendants an opportunity of showing by evidence that the order designating myself as the judge to hold the term of the court in place of Judge Sabin was not of record at Paris, Texas. The court not prohibiting them from tendering evidence on that point, said it was known to the court that a proper order authorizing the judge to hold the terms of court in the district and circuit court of the eastern dist. in Texas, fifth circuit was executed,
57 signed, and properly recordered at Galveston, Texas, which is one of the places for holding courts in the eastern districts. The court

further held as above because if it had been proved that such an order was not on record in the clerk's office at Paris, it would have had no weight in considering the allegations in the motion for arrest, because the order, to the knowledge of the judge, had been properly issued and was duly recorded or entered at Galveston, in accordance with his instructions. (Signed) Aleck Boarman, U. S. judge, and said bill with the endorsement was duly filed Nov. 22nd, 1889."

7th. Assignment of error: The Hon. Aleck Boarman had no legal authority to preside at Paris, Texas, on the trial of respondents, because he was judge of the western district of Lousiana, and not one of the judges of the other two judicial districts of Texas, nor was there any application made by the clerk of the court at Paris, for the selection of a judge to hold said court, and Hon. Aleck Boarman had no jurisdiction in the premises under the laws of the United States.

For the errors stated and apparent upon the record herein respondents pray that the judgment be reversed and the cause remanded for a new trial.

JOHN C. BALL AND ROBERT E. BOUTWELL,
By their Attorneys.
HODGES & POLLARD AND FREDERICK W. MINER,

(Endorsed:) The United States vs. John C. Ball & Robert E. Boutwell. Murder. Assignment of errors. Filed Aug. 22, 1890. H. H. Kirkpatrick, clerk.

58 In the circuit court of the United States for the eastern district of Texas, at Paris, Texas.

I, H. H. Kirkpatrick, clerk of said court, do hereby certify that the foregoing is a true copy of the record and all proceedings in the cause pending in said court numbered 3, on the criminal docket, and entitled The United States vs. M. F. Ball, John C. Ball, and Robert E. Boutwell.

Witness my hand and the seal of said court at my office in Paris, Texas, this first day of October, A. D. 1890.

[SEAL.] H. H. KIRKPATRICK, *Clerk.*

(Indorsement on cover:) No. 1351. John C. Ball and Robert E. Boutwell, plaintiffs in error vs. The United States. E. Texas. C. C. U. S. Filed October 6, 1890.

1 UNITED STATES SENATE,
Washington, D. C., Feb. 12th, 1891.

W. H. TAFT, Esq.,
Department of Justice:

MY DEAR SIR: Your favor of the 9th has been received, and it affords me pleasure to agree that the certified copy of the order of the circuit judge of the eastern district of Texas, assigning Judge Boarman in the place of Judge Sabin, shall be treated as a part of the record in the case of Ball and Boutwell vs. U. S.

Enclosed I send you the record.

Very truly yours,

CHAS. J. FAULKNER.

2 DEPARTMENT OF JUSTICE,
Washington, D. C. February 9, 1891.

Hon. C. J. FAULKNER,
U. S. Senate:

SIR: I write to ask that you kindly return to me the certified copy of the order of the circuit judge in the eastern district of Texas, assigning Judge Boarman to act in the place of Judge Sabin, and to inquire whether you will consent to the same being treated as part of the record in the case of Ball & Boutwell against the United States? If you will not consent, I shall be obliged to move the court for a writ of certiorari to complete the record.

I am, very respectfully yours,

WM. H. TAFT,
Solicitor-General.

3 In the district court of the United States, eastern district of Texas, at Galveston, from the minutes of said court, November term, December 4th, 1888.

UNITED STATES OF AMERICA,
Fifth judicial circuit, eastern district of Texas:

Whereas, it appears by the certificate of the clerk of the district court hereto annexed, that the Hon. Chauncey B. Sabin, United States district judge for the eastern district of Texas, is prevented by reason of illness from continuing the holding of the present November term of the district and circuit courts of the United States for the eastern district of Texas, at Galveston, and also the coming terms of said courts at Tyler, Jefferson and

Galveston in the year 1889; and whereas, in my judgment, the public interests require the designation and appointment of a district judge from another district within the circuit to hold the present and coming terms of the district and circuit courts in said eastern district during the disability of the judge of said district.

Now, therefore, I, Don A. Pardee, circuit judge of the fifth judicial circuit, in pursuance of law, do hereby designate and appoint the Hon. Aleck Boarman, judge of the western judicial district of Louisiana, to conclude the holding of the present November term of the district and
4 circuit courts for the eastern district of Texas, at Galveston, and also to hold the coming terms of the district and circuit courts in said eastern district of Texas, during the year 1889, and during the disability of the judge of said district, and to have and exercise within said district during said period, and during such disability the powers that are vested by law in the judge of said district.

Witness my hand at Galveston, December 4th, 1888.

DON A. PARDEE,
Circuit Judge.

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5 EASTERN DISTRICT OF TEXAS,
Galveston, Dec'r 4th, 1888.

To Hon. DON A. PARDEE,
U. S. Circuit Judge, Fifth Judicial Circuit:

I do hereby certify to you that the Hon. Chauncey B. Sabin, United States district judge for the eastern district of Texas, is prevented by reason of illness from continuing the holding of the present November term of the district and circuit courts of the United States for the eastern district of Texas, at Galveston; and also the coming terms of said courts at Tyler, Jefferson, and Galveston, in the year 1889.

In witness whereof I have hereunto set my hand and affixed the seal of the district court of the United States for the eastern district of Texas, at Galveston, this 4th day of December, 1888.

[SEAL.]

C. DART,
Clerk U. S. Dist. Court,
Eastern Dist. of Texas, at Galveston.

Indorsements: "Certificate of clerk and order designating Hon. Aleck Boarman, U. S. district judge, western district of Louisiana, to hold district and circuit courts in eastern district of Texas during disability of Hon. Chauncey B. Sabin. Filed Dec'r 4th, 1888. C. Dart, clerk.

6 In the district court of the United States for the eastern district of Texas, at Galveston.

I, C. Dart, clerk of the district court of the United States for the eastern district of Texas, at Galveston, in the fifth circuit and district aforesaid, do hereby certify the foregoing to be a true and correct copy of order designating Hon. Aleck Boarman, U. S. district judge for the western district of Louisiana, to hold circuit and district courts in eastern district of Texas

during the disability of Hon. Chauncey B. Sabin, and certificate of clerk as to disability entered and filed December 4th, 1888, as the same now appears of record on the minutes of said district court in my office.

To certify which witness my hand and the seal of said court, at Galveston, in said district, this the 22nd day of December, A. D. 1890.

[SEAL.] C. DART,
Clerk U. S. District Court, E. D. T., at Galveston.

7 (Indorsed:) No. ——. United States district court, eastern district of Texas. ——— ——— vs. ——— ———. Copy of certificate of clerk and order appointing Hon. Aleck Boarman to hold courts in eastern district of Texas.

8 (Indorsed:) Supreme Court U. S., 1890, October term. No. 1351. John C. Ball et al., plffs. in error, vs. The United States. Stipulation & addition to record. Office Supreme Court U. S. Filed Feb. 16, 1891. James H. McKenney, clerk.

Office Supreme Court U. S.
FILED,
MAR 18 1891
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States

October Term 1890.

JOHN C. BALL & ROB'T E. BOUTWELL, Plaintiffs in Error.

vs.

THE UNITED STATES, Defendant in Error.

Error to the Circuit Court of the United States for the Eastern District of Texas.

BRIEF OF PLAINTIFFS IN ERROR, BY

J. C. HODGES,
AUSTIN POLLALD,
R. F. HODGES,
For plaintiffs in error.

F. W. MINOR,
of Counsel.

In the Supreme Court for the United States

OF AMERICA.

October Term 1890

John C. Ball and Rob't. E. Boutwell, Plaintiffs in Error.

vs.

The United States, Defendant in Error.

Error to the Circuit Court of the United States for the Eastern District of Texas.

STATEMENT OF THE CASE.

John C. Ball and Robert E. Boutwell, plaintiffs in error and one M. F. Ball was jointly indited by the fedral grand jury, setting at Paris, Texas, on 17th day of October 1889; charging them with the murder of William T. Box, in Pickins County, Chickasaw Nation, Indian Teritory 26th day of June, 1889.

On the 30th day of October, 1889, the United States and the plaintiffs in error, and M. F. Ball announced ready for trial.

A jury was empanneled and the case proceeded to trial.

On Sunday the 3rd day of November 1889, the jury

returned into court the following verdict: "We, the jury find the defendants, J. C. Ball and R. E. Boutwell guilty as charged in the indictment, and we find M. Filmore Ball not guilty.

A. P. Ball, Foreman.

November 3rd, 1889."

The court then and there on said 3rd day of November 1889 entered the following order or judgement.

"It is therefore considered by the court that the defendants, J. C. Ball and R. E. Boutwell, are guilty as charged in the indictment herein and as found by the jury, and it is ordered that they be remanded to the custody of the marshal and be by him committed to the county jail of Lamar county, to await the judgement and sentence of the court. It is further ordered that the defendant M. F. Ball be discharged and go hence without delay."

Plaintiffs in error remaining in the county jail until the next term of the court for the Eastern District of Texas, which convened at Paris, Texas, on the 21st day of April 1890.

On the 5th day of May 1890, the following motion was filed.

The United States
vs.
John C. Ball and Robert E. Boutwell. } No. 3.

Now comes the United States by Joseph H. Wilson, United States attorney, and shows to the honorable court that heretofore to-wit, on the 15th of November 1889, John C. Ball and Robert E. Boutwell were sentenced, by this honorable court, to be hanged until dead for the crime of murder, of which crime said Ball

and Boutwell have been found guilty after trial by a jury. That no appeal from said sentence has been perfected by said John C. Ball and Robert E. Boutwell, or either of them. And the United States by Josesh H. Wilson, United States attorney moves and prays that this honorable court will fix a day upon which said John C. Ball and Robert E. Boutwell, the defendants in the above numbered and entitled can be executed and as in duty etc. "The United States."

By Joseph H. Wilson, U. S. Attorney.

Upon hearing motion the court fixed the 19th day of December 1890 for execution.

July 1890 plaintiffs in error filed their separate motions praying the court to set aside and hold for naught all that had been done in the case except the preliminary examination.

The motions are in substance:

1. Because no valid and legal indictment had been returned against defendants.

2. Aleck Boarman had no authority to hold the circuit court for the Eastern District of Texas at Paris, Because he was then the duly appointed judge of the Western District of Louisiana, and had not been designated or appointed to hold the court at Paris, Texas.

3. Because no legal judgment has ever been rendered against defendants.

4. Because no legal verdict was ever returned against defendants.

5. Because the Hon. D. E. Bryant has no legal authority to hold the present term of the court at Paris Texas.

On the hearing of motion defendants insupport of the motion introduced in evidence the judgement entered by Aleck Boarman on the 3rd day of November, 1889, (see page 20 of the record.) Defendants proposed to prove by the clerk that no order was entered on the minutes of this court, showing the appointment of Hon. Aleck Boarman, to hold said court, which evidence the court refused to hear; because there is in the papers a statement endorsed on a bill of exceptions, and signed by Hon. Aleck Boarman, stating in effect that his appointment was filed and entered at Galveston, (see p. 21 of record.) Defendants offered in evidence the sentence entered by Aleck Boarman, on the 15th of November, 1889, which is as follows:

"United States vs. J. C. Ball and Robert E. Boutwell. By reason of the law and the evidence, and the verdict of the jury in this case, it is ordered and adjudged that the defendants, Robert E. Boutwell and John C. Ball be executed, by being hung until each and either are dead, according to the forms, delays and processes of the laws of the United States. This done and signed in the open court, Aleck Boarman, Judge.

Brief and argument for plaintiffs in error:

The indictment, upon which the defendants was tried, is fatally defective, in that it does not allege when the deceased, Wm. T. Box, died, or that he died within a year and a day of the infliction of a mortal wound; or that he died within Territory in the jurisdiction of the court in which plaintiffs in error were tried.

This objection, necessarily arises on the record. The

sufficiency of the inditement was raised in plaintiff's in error motion, in arrest of judgement, and assigned 1st assignment in errors, (pages 9, 15, 24, record.)

The indictment sets forth that the plaintiffs in error "did unlawfully, fraudelently and feloneously, and with their malace aforethought, and with a certain deadly weapon to-wit; a gun in the hands of the said M. F. Ball, J. C. Ball and R. E. Boutwell, then and there held, make an assault in and upon the body of William T. Box with said gun, held as aforesaid, said gun being then and there loaded and charged with gunpowder and leaden balls; then and there held and used as aforesaid. The said M. F. Ball and the J. C. Ball and the said R. E. Boutwell did shoot off and discharge the contents of said gun in and upon the body of the said William T. Box, inflicting thereon ten mortal wounds, of which mortal wounds, the said William T. Box did languish, and languishing did die.

And so the grand jurors do present and say etc.,

"*page 3 record:*"

This is all of the indictment; descriptive of the manner, time and the place of the death of William T. Box, We submit the indictment is fatally defective in two particulars, while the indictment charges death from a mortal wound inflicted. There is no allegation that the said Box died within a year and a day from the infliction of the mortal wounds. The indictment also fails to allege the place of death. Both of the lacking allegations, we submit, are essential ingredients for every indictment for criminal homicide. We believe there

is a uniformity of statement in all the elementary writers and nearly all the decisions of the courts on this point.

2. Wharton on homicide, second edition, Sec. 845, says "death must appear to have been within a year and a day of the wound. Thus an indictment upon which it does not appear that death happened within a year and a day after the wound was given is fatally defective, because when death does not ensue within a year and a day after the wound is inflicted, the law presumes that it proceeded from some other cause. The date of the death therefore, as well as that of the stroke must distinctly appear: "The indictment does not fill the demands of the law in these two particulars.

Limit as to time, year and day:

In law, the killing is feloneous: only when the death takes place within a year and a day after the stroke; and that it did so, must appear from the date, or respective dates set down in the allegation; otherwise the indictment will be bad.

2. Bishop on Cr. pro., 3rd Ed. sec. 533.
1. Wharton pre indictments, appears page 114.
1. Wharton crime law 9th Ed. sec. 537.
State vs. Baker, 1 Jones N. C. p. 267.
State vs. Blan, 69 Mo. p. 317
Edmonson vs. State, 41 Texas, p. 496.
State vs. Shepard, Iredell's Rep. p. 195.

Place of Death:—

This indictment fails to allege place of death. It is not charged to have taken place within the jurisdiction

of the court. This is an essential averment.

1. Whartons crime law (9th Ed. sec. 539.)

Place must be averred:

An indictment at common law for murder should show that the deceased died in the county in which the indictment is found so "where the stroke was at one place or time, and the death at another. If the day be specially alleged it should be that on which the party died and not that on which he was stricken; for, until he died it could not be murder."

Wharton on homicice, 2nd Ed. src 846:

We understand that to-day an indictment for murder or any other offense, known to the common law for which a person may be prosecuted in the courts of the United States, where congress has denounced an offense by its common-law name as murder, sec. 5339, Revised Statutes, U. S., or as rape, sec. 5345. It stands as if the common law had been reinacted *totidem verbis*, and the common law therefore be resorted to for a definition of the crime.

United States vs. Coppersmith (4 F. R. 198, and 10 Rep. 517.

United States Onterbridge 5 Sawyers 620.

An indictment therefore must be good at common law. So if the indictment upon which plaintiffs in error was tried would not have been good at common law, then it is fatally defective.

Then we submit that the charge that Box did languish, and languishing did die. Does not charge that he then and there died.

"A charge that such a day at etc., A made an assault

upon B. and him with a knife, feloneously struck, killed and murdered was held not to import sufficiently that the stroke was at the same time and place, as the assoult for want of the words then an there."

1. Russell on crime (2nd Ed. —— p. 470.
1. Wharton crime law, (6th Ed. sec. 272.)
1. Bishop crime pre. (3rd Ed. sec. 407.)

There is no allegation in the indictment under con-consideration, "then and there languished" or that he languished and then and there died. The languished used in the indictment is "upon the body of the said William T. Box inflicting thereon ten mortal wounds of which mortal wounds the said William T. Box did languish and languishing did die."

The alegations in themselves clearly imports some laps of time after the infliction of the said mortal wounds before death occured. The words, "of which mortal wounds the said Box did languish, and languishing did die." Is, we think, an affirmative allegation that Box did not die immediately and that he did not die then and there. The words then and there as used in the indictment, refers to the time of the assault "then and there held, make an assault in and upon William T. Box." So it appears from the plain import of the words used in the indictment that the assault was on the 26th day of June 1889, in Pickins county, Chickasaw Nation, I. T., that ten mortal wounds were given to Box from the effects of which he languished, and languishing did die. How long Box languished,, or where he died, no one can tell from the indictment. Just here we submit the court can not look to the

date the offense is alleged to have been committed and the date of filing the bill to supply the failure to show in the indictment that the deceased died within a year and a day from the infliction of the mortal wounds.

Wharton on Homicide, 2nd Ed. sec. 845.

Nor can the court look to the concluding part of the indictment in support of the allegations of fact in the charging part.

The summary at the end of the indictment, "and so the grand jurrors aforesaid, upon their oaths aforesaid, do say that upon the day aforesaid, at the place aforesaid," is evidently a conclusion of law drawn from the facts theretofore stated.

Rex vs. Nichols 7 C. & P. 538.

If the facts stated in the charging part of the indictment do not substantiate it, the conclusion can not be used to cure the defect.

Fouts vs. State, 8 Ohio St. 98.

The foregoing view of defect in the indictment is abundantly supported by the following authorities:

The People vs. Floyd, 9 Cal. 54.

State vs. Morgan, 85 N.C. 581.

State vs. Sandys, 2 Moody 292.

Bish. crim. pro. 527.

Wharton pl. and pr. sec. 151.

Pomroys notes to Archbolds crim. pl. and pr. 791.

State vs Can 69 Mo. 321.

Edmondson vs State 41 Tex. 498.

Facts are to be stated, not conclusions of law. The indictment should therefore state the particulars, to inform the court as well as the accused. It must appear

from the indictment that the acts charged will if proved support a conviction for the offense alleged.

United States vs Cruikshanks 92 U. S. report p 544.

We insist that the facts might be proved as charged in the indictment and the plffs. in error not be guilty of murder. 1st. Admit that plffs. in error with malice aforethought did assault and inflict ten mortal wounds upun the body of William T. Box, and that Box languished and died from the effects of said wounds, then the plffs. in error are not proved guilty of the offense alleged.

Why? 1st. Because the proof fails to show that Box died within a year and a day after the mortal wounds were inflicted. It makes no difference that he died of the wounds; provided he did not die within a year and a day.

Because the law will not permit a conviction to stand no difference what the proof is as to cause of death unless it occurred within a year and a day after the mortal wound was inflicted.

2nd. Box may have languished and died within a year and a day from the time the mortal wounds were inflicted. And from the date the offense is alleged to have been committed it was less than a year and a day till the trial of this case came in the court below.

But from all that appears from the allegations in the indictment Box may have died in some county out of the jurisdiction of the court or beyond the seas.

Date of death and place of death must be specially alleged.

Wharton on Homicide Second ed. page 846.

1 Russell on crimes 2 Am. Ed. Marg. 470.

Words and phrases used in indictments are to be construed to have the same meaning as when used elsewhere.

The words "did languish" Mr. Webster and other Lexicographers all agree that to "languish" means to become languid or weak, to sink away, to lose strength or animation, to become dull, weak or spiritless, to be or grow heavy." The use of the words did languish means that Box lived after the infliction of the mortal wounds, whether a year and a day or longer does not appear from the indictment.

See indictment page 3 Record.

We submit that the words "did languish and languishing did die," have a meaning so well fixed in law, that if the indictment had charged and "languishing did immediately die" or languishing did instantly die, then the allegations would not have been insufficient.

1 Wharton crim. law 6 Ed. sec. 272.

1 Bishop crim. pro. 3 Ed. sec. 409.

Foster vs. State 9 Mo. p. 658.

State vs. Sides 64 Mo. 383.

The Sides case is exactly in point, should the court refer to the words then and there used elsewhere in the indictment. In the Sides case the indictmrnt used the words did immediately languish and languishing did die. Indictment was held bad in suppoat of the the ruling, see

2. Hale, P. C, 179.

2. Bishop, crim. pro. 533 and cases cited.

We submit the case ought to be reversed on 1st

asignment of error.

The 2nd Asignment of Error.

The court erred in overuling plaintiff's in error motion for new trial and arrest of judgement; the court ought to have sustained the motion in arrest; because the only judgement ever rendered against plaintiff's in error was rendered and entered of record on Sunday November 3rd 1889. On page 20 of the record will be found a copy of the only judgement ever rendered against the plaintiffs in error to-wit:

The United States
vs. } No. 3.
M. F. Ball, J. C. Ball and R. E. Boutwell.

"This day came the United States by her attorney and the defendants in their own proper person and by attorneys came and the jury of twelve good and lawful men, which heretofore had been tried, empaneled and sworn as required by law and having heard the evidence and argument of counsel and received the charge of the court and having on a former day of this term retired to consider of their their verdict, on this day brought into open court their verdict", in words and figures as follows to-wit: "We the jury find the defendants J. C. Ball and R. E. Boutwell guilty as charged in this indictment and we find M. Filmore Ball not guilty. Nov. 3rd 1889; A. P. Ball foreman." It is therefore considered by the court that the defendants; J. C. Ball and R. E. Boutwell are guilty as charged in the indictment herein and as found by the jury, and it is averred that they be remanded to the custody of the Marshal and be by him committed to the county

jail of Lamar county to await the judgement and sentence of the court. It is further ordered that the defendant M. F. Ball be discharged and go hence without delay." On page 5 of the record will be found an entry showing affirmatively that this judgement was entered on Sunday, if it can be considered a judgement. Our contention is: 1st, no judgement in legal form has ever been entered adjudging plffs. in error guilty of the offense of murder. The judgement fails to adjudge the plffs. in error guilty of any crime punishable by death. It adjudged them guilty as charged in the indictment, and, as found by the jury. The jury found plffs. in error guilty as charged in the indictment. And while from the judgement above quoted, plffs. in error was remanded to await the judgement and sentence of the court, it appears from the record that no other or further judgement was ever entered against the defendants. The only order made after this at that term of the court was entered on the 15th of Nov. 1889. To-wit: "In U. S. Circuit Court Eastern District Texas

United States
vs. } No. 3.
Robt. E. Boutwell and John C. Ball

"By reason of the law and the evidence and the verdict of the jury in this case it is ordered and adjudged that the defendants Robt. E. Boutwell and John C. Ball be executed by being hung until each and either are dead according to the forms delays and processes provided in the laws of the United States. This done and signed in open court Nov. 15 1889."

Page 10 Record, Aleck Boarman Judge."

asignment of error.

The 2nd Asignment of Error.

The court erred in overuling plaintiff's in error motion for new trial and arrest of judgement; the court ought to have sustained the motion in arrest; because the only judgement ever rendered against plaintiff's in error was rendered and entered of record on Sunday November 3rd 1889. On page 20 of the record will be found a copy of the only judgement ever rendered against the plaintiffs in error to-wit:

The United States
vs. } No. 3.
M. F. Ball, J. C. Ball and R. E. Boutwell.

"This day came the United States by her attorney and the defendants in their own proper person and by attorneys came and the jury of twelve good and lawful men, which heretofore had been tried, empaneled and sworn as required by law and having heard the evidence and argument of counsel and received the charge of the court and having on a former day of this term retired to consider of their their verdict, on this day brought into open court their verdict", in words and figures as follows to-wit: "We the jury find the defendants J. C. Ball and R. E. Boutwell guilty as charged in this indictment and we find M. Filmore Ball not guilty. Nov. 3rd 1889; A. P. Ball foreman." It is therefore considered by the court that the defendants; J. C. Ball and R. E. Boutwell are guilty as charged in the indictment herein and as found by the jury, and it is averred that they be remanded to the custody of the Marshal and be by him committed to the county

jail of Lamar county to await the judgement and sentence of the court. It is further ordered that the defendant M. F. Ball be discharged and go hence without delay." On page 5 of the record will be found an entry showing affirmatively that this judgement was entered on Sunday, if it can be considered a judgement. Our contention is: 1st, no judgement in legal form has ever been entered adjudging plffs. in error guilty of the offense of murder. The judgement fails to adjudge the plffs. in error guilty of any crime punishable by death. It adjudged them guilty as charged in the indictment, and, as found by the jury. The jury found plffs. in error guilty as charged in the indictment. And while from the judgement above quoted, plffs. in error was remanded to await the judgement and sentence of the court, it appears from the record that no other or further judgement was ever entered against the defendants. The only order made after this at that term of the court was entered on the 15th of Nov. 1889. To-wit: "In U. S. Circuit Court Eastern District Texas

United States
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Robt. E. Boutwell and John C. Ball

"By reason of the law and the evidence and the verdict of the jury in this case it is ordered and adjudged that the defendants Robt. E. Boutwell and John C. Ball be executed by being hung until each and either are dead according to the forms delays and processes provided in the laws of the United States. This done and signed in open court Nov. 15 1889."

Page 10 Record, Aleck Boarman Judge."

By the terms of the above order plffs in error ars 1st to be hung jointly, 2nd; at some indefinite time, 3rd; at some indefinite place, 4th; by some unknowo person, 5th; without the issuance of any death warrant, 6th; they and "each and either" of them are to die according to the forms, delays and processes provided in the laws of the United States; 7th, this to be done in open court and signed by Aleck Boarman; 8th, the indictment which we contend is totally defective, is to be the only record evidence left on earth after the hanging from which it can possibly be ascertained for what offense the plaintiffs in error suffered death.

2nd. If the judgement and sentence above quoted was in form as required by law, then the fact that the judgement was entered of record on Sunday, Nov. 3rd. 1889, would require a reversal of the case.

Our contention is that a judgement entered of record on Sunday is not only erroneous but is absolutely void. In support of this proposition we snbmit the following authorities:

Baxter vs. the People, 3 Ill. (Gilm) 385.
Swann vs. Brown 3 Corr. 1595.
3 Thomas Coke 354.
2 Bl. Com. 277.
Mackelday's case, 5 Coke 66.
Pearce vs. Atwood, 13 Mass. 324
Chapman vs. State, 5 Blackf. (Ind.) 111.
Nabors vs. State, 6 Ald. 200.
4 N. H. 158.
Authur vs Mosely 2 Mills 589.
Story vs. Eliott, 8 Com. 27.

1 Wend. 57.

Coleman vs. Henderson, Litt. Ky. Sel. Cas. 171.

Wendeimerker vs. the people, 5 Wend. 530.

Harper vs. State, 43 Texas 431.

Canton delivering the opinion in the Baxter case says "Hnd the court the right to receive the verdict and pronounce judgement on Sunday. That courts have no right to pronounce a judgement or do any other act strictly judicial on Sunday, unless, expressly authorized by statute. It seems to be too weil settled to admit of doubt by the decisions in England and in this country."

The learned Judge in the Baxter case used these words, "We think the authorities clearly establish that when a case is submitted to a jury before 12 o'clock Saturday night, the verdict of the jury may be received on Sunday, but that is not a judicial day for the purpose of entering any judgement, and if it attempts to render a judgement, still in law it would be no judgement, but absolutely void, and, will be so declared and may be reversed by this court. Not that such reversal will take from it any force or validity, for it never had any not being rendered by a court having authority to render any judgement whatever at this time." 3 Ill. (Gilm) 386.

We have not been able to find any statute of the U. S. authorizing Federal courts to render judgements on Sunday, and if we follow the State rule in Texas where this case was tried we call attentton to Sherman vs. the State, 1st. Court of Appeal, Texas 215, in which Judge White reviews and qnotes the authorities

here cited with approval. If it is contended that the judgement entered of record on Sunday was only receiving the verdict, then we submit the case must be reversed because the sentence entered by Judge D. E. Bryant on the 19th. day of July 1890, was so entered without any judgement adjudging plaintiffs in error guilty of any offense. P. 12 Record

In this connection we will notice the 3rd. assignment of error:

"The court erred in entering a joint judgement in said cause against defendants and in entering a joint sentence of death thereon, and said judgement and sentence is not entered according to law, and the motion of defendants in arrest of judgement should have been granted, which motion was filed Nov. 15th 1889, p. 7 Record.

The judgement should have been rendered separately. A joint judgement in a capital case will not be sustained. "On convtction upon a joint indcitment the judgement must be several."

United States vs. Ismenard, 1st Cranch C. C. 150.

Our contention is that before the sentence of death can be pronounced against a person convinted of murder there must be a judgement entered adjudging the person guilty of the offense of murder. And the judgement will not be sufficient if it only adjudges the person guilty of the offense charged in the indictment, or as found by the jury. The judgement should adjudge affirmatively and not by infereuce or reference to some other record.

Calwell vs. Commonwealth, 7 Dana, 229.

It will be observed in this connection that the several sentences ente ed by the Hon. D. E. Bryant on July 19th. 1890, page 12 Record does not attempt to cure any defect in the judgement entered on the 3rd. of Nov. 1889, but refers to said judgement as authority for fixing time of the execution under said judgement.

III

4th. Assignment of error raises the question as to the power and authority of Judge D. E. Bryant to hold any part of a term of court at Paris commencing on the 21st. day of April, 1890.

That the sentence fixing the time of execution of plaintiffs in error, and ordering a death-warrant to issue was entered at a term of court which had lapsed, and there was no jurisdiction or power to hold the term at which said sentence was entered. We have been unable to find any authority in the law under which Judge Boarman who was at that time the U. S. district judge for the Western Dist. of Louisana, could lawfully hold the court for the Eastern Dist. of Texas. After the vacancy made by the death of Judge Sabin, who died on the 30th. of March 1890, and was at the time of his death U. S. Judge for the Eastern Dist. of Texas.

The term of court held by Boarman and Bryant was a stated term of the Circuit, and Dist. courts for the Eastern Dist. of Texas, which commenced on the 21st. of April, 1890. Judge Boarman opened the court on the 21st. of April 1890, and held the same and adjourned from day to day until the 2nd. day of June 1890. On which day the Hon. D. E. Bryant, qualified as the

successor of Hon. C. B. Sabin, and assumed authority to hold the remained of said stated term of said court.

The only provision by which the U. S. Judge of any district can hold a court in another district in case of a vacancy in the office of District Judge thereof is found in Revised Statutes, Sec. 603. But this only authorizes a district judge of the same state to do so. Sec. 591, 592, 593, 594, 595, 596 Revised Statutes, U. S. do not nor does either of them empower the circuit Judge or Justice to appoint a district Judge within the same circuit to hold court in a district when the office of Judge thereof is vacant nor does any other statute we have found do so.

The death of a Judge is not a "disability" within the meaning of the Statutes Exparte U. S. 1st. Gall. 338.

We think that Judge Boarman was wholly without authority to open or hold the court at Paris during the vacancy caused by the death of Judge Sabin, and that Judge Boarman's acts in assuming to open and hold and adjourn it from day to day, on, and from April 21st. to June 2nd. 1890, were void. In short our contention is, that the Circuit court at Paris for the session provided by law to commence on the 21st. day of April 1890, was never legally opened or continued in consequence of which it lapsed and failed to exist as a term in which a Judge could sit and have authority and jurisdiction as a court.

The manner in which, and the officer by whom, the Circuit court may be opened and adjourned from time to time in the absence of the Judge are provided by Sections 671 and 672 of the Revised Statutes, U. S.

As neither of the Judges of the Circuit court was present, Judge Boarman was without authority as we contend. The Marshal might have adjourned from day to day until the 4th. day, then, if no Judge came the term passed, by adjournment to the next term.

The provisions of sec. 671 and 672 show that stated terms of the Circuit courts of the United States do not open and continne themselves without some authorized official action for that purpose. Sec. 602 Revised Statutes, U. S. supports the foregoing views.

When Judge Bryant assumed to hold court on and after the 2nd. day of June 1890, and fix a time for the execution of plaintiffs in error, the term commencing April 21st. 1890. had irrevocably failed, hence the sentence entered by the Hon. D. E. Bryant, July 19th. 1890, is absolutely void.

See the Alaska, 35 Fed. Rep. 555.

IV

5th Assignment of Error.

"The court erred in refusing to allow the wives of these respondents, J. C. Ball and R. E. Boutwell to testify in said cause as set forth in motion for new trial, arrestot judgement, and sentence filed Nov. 15th. 1889, which grounds are stated in paragraph 3rd. of said motion. "Because the court erred to the prejudice of the defendants in refusing to permit the wives of the defendants, J. C. Ball and R. E. Boutwell to testify in favor of any or either or all of said defendants upon trial hereof as shown by bill of exceptions, No. 2," And your respondents respecfully urge that there is

now no recognized rule of law which prevents the wife from testifying in behalf of her husband, etc.',

Page 25 Record.

The wives of plaintiffs in error were offered to prove an alibi, and other material facts to the defendants. Counsel for the government objected because the wife could not testify for or against her husband, under the common law rule, which objections was sustained by the court to which ruling plaintiffs in error then and there excepted.

While we understand that the common law rule rejects the evidence of the wife in a case like the one at bar, yet we contend that, under the laws of the United States and the laws of the state of Texas. The wife is a competent witness for her husband in any case tried in the federal court in the state of Texas. The wife's incompetency at common law rests safely upon the ground of public policy. 18th. Wall. 453.

The Texas Statutes code cr. pro. sec. 735 provides; "The husband and wife may in all criminal actions be witnesses for each other, but they shall in no case testify against each other; except in a criminal prosecution for an offense committed by one against the other."

An act was passed by congress on the 6th. of July, 1862, fixing a rule of decision as to competency of persons to testify in the federal courts, said act provides as follows: "The laws of the state in which the court shall be held; shall be the rules of decision as to the competency of witnesses in the courts of the United States."

18 Wallace U. S. Reports, 453.
Revised Statutes, U. S. Sec. 858.

V

Should the question be raided as to the plaintiffs in error right to prosecute this appeal, we will call the atnention to the record, judgement rendered Nov. 3rd. 1889, remanding plaintiffs in error to await the judgement and sentence of the court, pages 5 and 6 Record. Also sentence page 10, in which no time is fixed for the execution also motion filed by the U. S. attorney on the 5th. day of May 1890, praying fot final judgement against plaintiffs in error, fixing time for execution, page 11 Record. Also the judgement or sentence pronounced and entered of record on the 19th. day of July 1890, fixing the date of execution on 19th. day of Dec. 1890, page 12 Record.

Also motion for time, within which to file petition for writ of error to supreme court, page 22, Record.

Also petition for writ of error to the supreme court of the United States filed 22nd. day of August, 1890.

Page 23 Record.

The act of congress under which plaintiffs in error sued out their writ of error and brought this case before the supreme court, provides: "That hereafter in all cases of conviction of crime the punishment of which provided by law is death, tried before any court of the United States. The final judgmsnt of such court against the respondent shall upon the application of respondent, be examined, reversed, or affirmed by the supreme cour of the United States upon

a writ of error under such rules and regulations as the said court may provide, etc."

Page 656 Sec. 6 Acts. 1889.

It will be observed that the above quoted statute only provides for appeal on writ of error from the final judgment of the trial court.

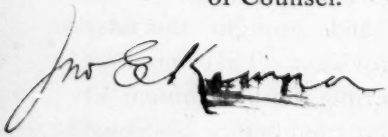
We therefore conclude that the plaintiffs in error had no right to sue out their writ of error to supreme court of the United States, until there was a final judgment rendered against them in the court below.

We do not suppose it will be contended that the record shows that any find judgment was rendered against plaintiffs in error until July 19th. 1890, when the court then presiding fix the day of execution on the 19th. of Dec. 1890.

We therefore submit the case ought to be reversed and the present indictment dismissed for errors assigned and herein argued.

J. C. HODGES,
AUSTIN POLLALD,
R. F. HODGES,
For plaintiffs in error.

F. W. MINOR,
of Counsel.



Office Supreme Court U. S.
FILED,
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JAMES H. McKENNEY
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 1351.

JOHN C. BALL AND ROBERT E. BOUTWELL,
Plaintiffs in Error,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

BRIEF FOR PLAINTIFFS IN ERROR.

BY
JNO. E. KENNA,
CHAS. J. FAULKNER.

GEO. R. GRAY, PR., GLOBE OFFICE.

In the Supreme Court of the United States.

October Term, 1890.

JOHN C. BALL and ROB'T E. BOUTWELL, Plaintiffs in Error,
vs.
THE UNITED STATES, Defendant in Error.

1. The Indictment is Fatally Defective.

The indictment is fatally defective for its utter failure to allege either the *time* or *place* of the death of the deceased, Wm. T. Box.

The only charge in the indictment relating to the death of said decedent is in the following words:

> "Of which mortal wounds the said Wm. T. Box *did languish and languishing did die.*"

How long the deceased languished and when and where he died is matter utterly disregarded by the pleader. But in an indictment for murder both the time and place of death are substantial elements of the offense, and must be alleged in the indictment. The time of death is essential to enable the court to see that death has occurred within a year and a day of the infliction of the mortal stroke, otherwise no murder has been committed. The place of death is still essential to enable the court to look to its jurisdiction. At common law this was especially true, because if the wound had been given in one jurisdiction and the death occurred in another there was no murder in either. This doctrine became matter of

doubt and difficulty, and 2 and 3 Edward, 6, c. 24, § 2, was interposed to authorize the prosecution in the county in which the death occurred, but the *place of death* was and is still material as defining and fixing the jurisdiction. The principle asserted is not affected by section 5339 of the Revised Statutes.

That section provides:

> "Sec. 5339. Every person who *commits murder*—
>
> "First. Within any fort, arsenal, dock-yard, magazine, or in any other place or *district* of *country* under the *exclusive jurisdiction* of the United States;
>
> "Second. Or upon the high seas, or in any arm of the sea, or in any river, haven, creek, basin, or bay within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular State;
>
> "Third. Or who *upon any such waters* maliciously strikes, stabs, wounds, poisons, or shoots at any other person; of which striking, stabbing, wounding, poisoning, or shooting such other person dies, either on land or at sea, *within* or *without* the United States, shall suffer death."

It will be observed that this statute makes but one exception to the common law rule under discussion. When the stroke is maliciously given upon the high seas or in any arm of the sea or in any river, haven, creek, basin or bay within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State, and the person so stricken dies, "either on land or at sea, within or without the United States," the Federal court has jurisdiction. The case at bar does not involve a stroke upon "any such waters," and the statute leaves it where it found it, subject to the general law of homicide. And so the place, as well as the time of death, is a material fact, and, being a material fact, is a material allegation. As the omission of both the time and place of death bears the same relation to

the indictment, the objection thus presented may be discussed, as indeed it generally is, as one proposition.

> "From the earliest history of the common law all homicides have been regarded as composed of two distinct elements, neither of which has been allowed in theory or in legal practice to merge the other. The injury which causes death is never regarded as constituting the crime of murder or manslaughter. The death of the victim not only within a year and a day, but also within the same jurisdiction, was the controlling element which distinguished the guilt of the assailant from a common assault. The time and place of death were always considered as necessary to be averred, and were required to be averred as independent of the averments of assault. Until provided by statute, death in one county from an attack in another did not make murder in either county."
>
> Chapman *vs.* The People, 39 Mich., 1878, p. 360.

> The elements of time and place, and consequently the allegation of them, pertain to no one part of an offence and the accusation of it, but are essential in all. * * * The general doctrine is stated by Chitty to be that time and place should "not merely be mentioned at the beginning of the indictment, but be repeated to every issuable and triable fact."
>
> 1 Bp. Cr. Pro., 3rd Ed., §§ 407 and 408.

> "Thus an indictment, upon which it does not appear that the death happened within a year and a day after the wound was given, is fatally defective; because when the death does not ensue within a year and a day after the wound is inflicted, the law presumes that it proceeded from some other cause. The date of the death, therefore, as well as that of the stroke, must distinctly appear."
>
> Wharton on Homicide, Second Edition, section 845.

> "In law, the killing is felonious only when the death takes place within a year and a day after the stroke. And that it did so must appear from the date or respect-

ive dates set down in the allegation, otherwise the indictment will be ill."

2 Bishop on Cr. Pro., Third Edition, sec. 533.
1 Wharton Prec., Indictments and Pleas, p. 114.
1 Wharton Crim. Law, Ninth Edition, sec. 537.
State *vs.* Baker, 1 Jones, N. C., 267.
State *vs.* Blan, 69 Mo., 317.
Edmundson *vs.* State, 41 Texas, 496.
State *vs.* Shepard, 8 Ire., 195.

"An indictment for murder is bad, if it do not set forth the time of the death as well as of the stroke."

5 Bacon Abridgment, Bouvier Ed., p. 80.

"It is laid down as an undoubted principle in all the books that treat of this matter that no indictment whatsoever can be good without precisely showing a certain year and day of the material facts alleged in it."

5 Bacon Abridgment, Bouvier Ed., p. 79.

"The place of the death, equally with that of the stroke, must be stated to show jurisdiction in the Court, on principles already mentioned."

2 Bp. Cr. Pro., 3rd Ed., § 534.

"Every indictment at common law must expressly show some place wherein the offense was committed, which must appear to have been within the jurisdiction of the court in which the indictment was taken, and must be alleged without any repugnancy."

5 Bacon Abridgment, Bouvier Ed., P. 81.

"The indictment at common law should also aver that the deceased died in the county in which the indictment is found."

Wharton on Homicide, 2d Ed., Sec. 846.

And so on the same principle under the subdivisions of federal jurisdiction the indictment should allege the *district* or *jurisdiction* by whatever name designated wherein the deceased died.

It can not be necessary to argue that the words—

"Of which mortal wounds the said Wm. T. Box *did languish and languishing did die*"—

Utterly fail to charge either the time or place of the death.

"Even if the language had been 'and languishing did immediately die,' or 'and languishing did instantly die,' the allegation would have been insufficient."

1 Wharton Crim. Law, Sixth Edition, sec. 272.
1 Bishop Crim. Pro., Third Edition, sec. 409.
Lester *vs.* State, 9 Mo., 658.

In Sides' case, 64 Mo., 383, on page 385, the court said:

"In the case at bar the indictment only charges that the deceased did immediately languish and languishing did die. The allegation fails to show when and where he died."

And was held bad.

"A charge that A, on such a day, at, &c., made an assault upon B, and him with a knife feloniously struck, killed and murdered, was held not to import sufficiently that the stroke was at the same time and place as the assault for want of the words 'then and there.'"

1 Russell on Crimes, 2d Am. Ed., marg. p. 470.
1 Wharton Cr. Law, Sixth Edition, section 272.
1 Bishop's Crim. Pro., Third Edition, section 407–8 *et seq.*, section 413.

In United States *vs.* Cruikshank, 92 U. S., 542, Chief-Justice WAITE, delivering the majority opinion (p. 556), said:

"We may suspect that race was the cause of the hostility; but it is not so averred. This is material to a description of the substance of the offense, *and cannot be suppled by implication.* Everything essential must be charged *positively*, and not *inferentially*. The defect here is not in form, but in substance.

"The rule," says CLIFFORD, J., in U. S. *vs.* Crook, 17 Wallace, 174, "is universal, that every ingredient of which the offense is composed must be accurately and clearly alleged in the indictment, or the indictment will

be bad, and may be quashed on motion, or the judgment may be arrested or reversed on error."

Edmunson *vs.* State, 41 Texas R., 496.
The State *vs.* Blan, 69 Mo., 317, 322.
People *vs.* Wallace, 9 Cal., 30.
People *vs.* Lloyd, 9 Cal., 54.

It is equally well settled that the defect being matter of substance and not of "form only," is *not cured by verdict*, and advantage may be taken of the omission by motion in arrest of judgment.

Cruikshank's Case above cited.
United States *vs.* Carl, 105 U. S., 611.
United States *vs.* Hess, 124 U. S., 483.

In the latter case it was expressly held that such defects are matter of substance and not of "form only" within the provision of sec. 1025, Rev. Stats., U. S. In this case the essentials of a good indictment are thus clearly stated by Mr. Justice FIELD:

> "The general and, with few exceptions, of which the present is not one, the universal rule on this subject is that all the material facts and circumstances embraced in the definition of the offense must be stated, or the indictment will be defective. No essential element of the crime can be omitted without destroying the whole pleading. The omission can not be supplied by intendment or implication, and the charge must be made directly, and not inferently, or by way of recital."

* * * * * * *

In matters of subtance, and not of form, omission is not aided or cured by verdict.

See also U. S. *vs.* Slenker, 32 Fed. Rep., 691.
U. S. *vs.* Conant, 9 Cent. Law J., 129.

Nor can the concluding summary "and so," &c., be invoked in aid of the preceding defective allegation.

"The formal conclusion of the indictment, "and so the jurors aforesaid say," &c., very clearly imputes the crime of murder, but we do not rely on it, for the elementary writers all agree that a charge substantially defective is not to be helped out by this formal conclusion. And it must indeed be so, for, in strictness of speech, the reference "and so" is to the charge as laid, and if that does not amount to murder these customary words cannot make murder of it. To allege merely that a prisoner wounded a man, and then to conclude "and so" he killed and murdered him, would not be an indictment for murder."

Lutz *vs.* Commonwealth, 29 Penna. State Reps., 445.

This appears to be a terse and lucid exposition of the law of this subject. But see also:

Shaffer *vs.* The State, 35 N. W. Rep., 384.
Leonard *vs.* Territory, 7 Pac. Rep., 872.
Fout *vs.* State, 8 Ohio State, 98.

2. Even if the Indictment had been good the Proceedings after Verdict are Defective and wholly Insufficient. The Judgment is Bad.

The proceedings in the lower court of *Sunday*, November 3, 1889, as appears by the record, pages 5 and 6, were as follows:

SUNDAY, *November 3rd*, 1889.

THE UNITED STATES
vs.
M. F. BALL, J. C. BALL, & R. E. BOUTWELL. } 3.

This day came the United States, by her attorney, and the defendants in their own proper persons and by attorneys came, and the jury of twelve good and lawful men which heretofore had been tried, empanneled, and sworn as required by law, and having heard the evidence and argument of council and received the charge of the court, and having on a former day of this term retired

to consider of their verdict, on this day brought into open court their verdict in words and figures as follows, to wit:

"We, the jury, find the defendants, J. C. Ball & R. E. Boutwell, guilty as charged in this indictment, and we find M. Filmore Ball not guilty.

"Nov. 3rd, 1889.

"A. P. BALL, *Foreman.*"

It is therefore considered by the court that the defendants, J. C. Ball and R. E. Boutwell, are guilty as charged in the indictment herein and as found by the jury, and it is ordered that they be remanded to the custody of the marshal and be by him committed to the county jail of Lamar County, to await the judgment and sentence of the court. It is further ordered that the defendant, M. F. Ball, be discharged and go hence without day.

It must be remarked here that neither does the verdict find nor the judgment pronounce J. C. Ball and R. E. Boutwell guilty of *murder*. They are adjudged guilty "as charged in the indictment and as found by the jury." When we turn to the verdict they are *found* guilty "as charged in this indictment." Nowhere is the crime of murder mentioned in either the judgment or the verdict. The language of the verdict may be sufficient. It would seem from the authorities that it is. But if the verdict found in terms that the defendants were both and each guilty of murder it would not remove the objection to the judgment. The judgment is the conclusion of the law, and it must not be argumentative or inferential, but specific and, in every essential, complete in itself. Suppose after conviction the indictment were lost. In some of the States (14 Ohio, 295; 4 Greene, Iowa, 189), and doubtless in others it may be supplied by copy. This indeed is stated by Bishop (1 Crim. Pro., 3d Ed., 1,400) as the general law. We turn, then, to the judgment. It

refers us to the verdict and to the indictment. We turn to the verdict. It refers us to the indictment. We look, then, for the indictment, and suppose it be lost.

Now in this dilemma, according to the authorities we have quoted, the indictment may be supplied after conviction by copy, but the copy must be verified to the satisfaction of the court. Shall it be said that the Government or her citizen must be "put upon the country" to ascertain whether the citizen has been convicted of murder or common assault; of treason or petit larceny? But, in other States and by other authorities it is held that lost indictments cannot be supplied. In Mr. Freeman's note to paragraph 89, second edition of his work on judgments, he says:

> "The power which enables courts to supply the entire record, if lost or destroyed after judgment, extends to supplying any of the pleadings or papers in civil cases prior to the judgment. But the court has no such power over an indictment. An indictment proceeds from the grand jury. The court has no creative or amendatory power over it. If it is defective another grand jury must be called upon to supply the defects. Probably, if after conviction and sentence the record were destroyed, the court might supply it for purposes of evidence, as in civil cases. But the defendant can be tried only on an original indictment; the court has no authority to establish a copy in the place of the original. If the original be lost the only remedy for the prosecution is to have the defendant reindicted."
>
> Bradshaw's Case, 16 Gratt., 507.
> State *vs.* Harrison, 10 Yerg., 542.
> Ganaway *vs.* State, 22 Ala., 772.

Hence in the case at bar, if this line of decision were to be followed, the loss of the indictment in this case would lose both the verdict and the judgment. The judgment would stand in the very words of the court. The verdict is recorded in the very words of the jury, and yet if the in-

dictment could not be supplied the court would stand mute confronting its own record confessedly correct, exhibiting a judgment and sentence of death for an offense wholly unknown and unascertainable save by an indictment which is lost and cannot be reproduced. On the other hand, if the whole record were destroyed and the proposed substitution disputed, the court would be obliged to inquire of the country whether the judgment proposed to be substituted were correct, and ascertaining that fact to its satisfaction it would be obliged in this case to inquire in the same manner whether the verdict proposed to be substituted were correct, and again ascertaining that fact to its satisfaction it would be driven to the same inquiry with regard to the indictment, and thus upon three several inquiries, prompted by the discretion of a single judge, would depend the validity and force of a judgment and sentence of death.

If by anology to the requirements of the Revised Statute with reference to civil cases the proceedings prescribed by the Texas statutes are to be followed in criminal cases, a lost indictment could be supplied by the mere certificate of the prosecuting attorney, and this either before or after conviction.

The Texas Statute, Wilson's Cr. Tex. Stats., Part 2, Code Cr. Pro. Sec. 2005, Art. 434 provides:

> "When an indictment or information has been lost, mislaid, mutilated or obliterated, the district or county attorney may suggest the fact to the court, and the same shall be entered upon the minutes of the court, and in such case another indictment or information may be substituted upon the written statement of the district or county attorney that it is substantially the same as that which has been lost, mislaid, mutilated or obliterated.

This statute has repeatedly been held to apply to an indictment lost after as well as before conviction."

Schultze *vs.* State, 15 Tex. Ap., 258.
Harwood *vs.* State, 16 Tex. Ap., 416.

So that under the Texas Statute and decisions, if in this case the verdict were lost, mislaid, mutilated or obliterated, the judgment of the court would have to stand, as well as the verdict of the jury, upon an indictment substituted upon the mere certificate of the district attorney, and upon this certificate alone would depend the verdict, judgment, and sentence of death. It is submitted that this illustration is not too remote to emphasize and enforce the necessity for precision and specific accuracy, and for certainty and completeness in both the form and substance of the judgment in a capital case.

The absence or loss or failure in the record in this very case of bill of exceptions No. 2 may lose to the defendants a review by this court of the decision below which excluded the testimony of two living, present and important witnesses—the wives of the defendants.

But suppose, as declared by Freeman and the other authorities he cites, the indictment could not be supplied, is it comprehensible to the judicial mind that a judgment and sentence of death shall stand upon the constantly recurring contingency of a lost or misplaced paper in the files of the courts? Suppose that in this case executive clemency should intervene between the sentence of death and its execution. Shall the future security of these defendants against a second jeopardy depend for the remainder of their natural lives upon the preservation of a scrap of paper in the clerk's office at Paris, Texas, which is liable at any moment to be lost, mutilated, misplaced, or destroyed?

Indeed, without argument, certainty and precision in the judgment seems to be the general and accepted rule. Even in civil cases it is declared upon authority by Black on Judgments, Vol. 1, sec. 118, that—

> "All judgments must be specific and certain; they must determine the rights recovered or the penalties imposed, and be such as the defendant may readily understand and be capable of performing. A judgment, it is said, must be so certain that the clerk can issue an execution by inspection of it without reference to other entries."
>
> "And always the court should take special care to make it precise and accurate."
>
> 1 Bp. Cr. Pro., 3rd Ed., 1297, and authorities cited.

For further discussion of this proposition, see 3 Pike, Ark., 491; 2 Root, 282; 1 B. and C., 711; 35 Miss., 210; 8 Kans., 299; 40 Tex., 289.

Upon both principle and authority it is submitted that the judgment of November 3d, 1889, as shown by the record, page 6, is too indefinite and vague, and therefore bad.

3. But in addition to the foregoing objection the judgment is clearly illegal, because it was pronounced and entered on Sunday.

The receiving of a verdict on Sunday seems to be justified by practice and supported by authority on the theory that it is a mere conventional or ministerial act and involves and exercises no judicial function. But the rendering of judgment or pronouncing of sentence thereon is strictly within the judicial province, involves the exercise of the very highest judicial function, and since Swann *vs.* Broome, 3 Burrow, 1595, which seems to be the leading case on the subject, it has been held by uniformity of decision that a judgment rendered on Sunday is invalid and void.

Mackalley's Case, 5 Coke, 111.
Sherman *vs.* State, 1 Texas Ap. 215; 3 Thomas Coke, Litt. P., 354.
Pearce *vs.* Atwood, 13 Mass., 324.
Chapman *vs.* State, 5 Blackford (Ind.), 111.
Nabors *vs.* State, 6 Ala., 200.
Frost *vs.* Hull, 4 N. H., 153.
Arthur *vs.* Mosby, 2 Bibb, 289.
Story *vs.* Elliott, 8 Cowen, 27.
Coleman *vs.* Henderson, Litt. Ky., Sel. Cas., 171.
Blood *vs.* Bates, 31 Vt., 147.
Baxter *vs.* The People, 8 Ills. (Gilman), 368.

And the Supreme Court of Maryland has within the last ten days, in an opinion not yet reported, announced the same principle. This opinion could be had, doubtless, if it were deemed important, but the authorities cited seem to be sufficient.

The attempt to remedy this difficulty by the order entered on the 15th of November, page 10 of the record, is abortive. It is painful to find such an order in the proceedings of any court of record having jurisdiction of both life and property. The order reads as follows:

In U. S. Circuit court, eastern dist. Texas.

UNITED STATES
vs.
ROBT. E. BOUTWELL & JOHN C. BALL,

By reason of the law and the evidence and the verdict of the jury in this case, it is ordered and adjudged that the defendants, Robt. E. Boutwell and John C. Ball, be executed by being hung, until each and either are dead, according to the forms, delays, and processes provided in the laws of the United States.

This done and signed in open court Nov. 15, 1889.

ALECK BOARMAN,
Judge.

This order does not pretend to adjudge the defendants guilty of any offense, nor does it even refer to any judgment, or supposed judgment against them. As the judgment or sentence of a court it is utterly meaningless, senseless, and

unworthy of discussion. Apart from its inherent defects it is conspicuous for the absence of the defendants when it was pronounced. It is bad for everything and good for nothing.

But on the 18th day of July, 1890, at another term, Judge Bryant, a different judge presiding, as if in review of the past proceedings in this cause, a final sentence was entered, and entered separately as to each of the defendants. As these sentences are in the same words we will quote but one. This is based upon the application of the attorney for the Government, in which it is recited, pages 11 and 12 of the record, that the defendants had been sentenced to death on the 15th day of November, 1889, and is as follows:

(Endorsed:) 3. In circuit court. The United States *vs.* Jno. C. Ball & Robert E. Boutwell. Motion of U. S. to fix a day for execution. Filed May 5, 1890. H. H. Kirkpatrick, clerk. J. H. Wilson, U. S. att'y.

THE UNITED STATES *vs.* JOHN C. BALL. } 3.

This day came the United States, by the United States attorney, and the defendant in his own proper person and by attorney appeared, and the United States attorney moved the court to fix a day of execution of the defendant, John C. Ball. And it appearing to the court that on the 15th day of November, 1889, during a former term of this court, the sentence of death was pronounced upon the defendant, John C. Ball, for the crime of murder, in compliance with the law and the verdict of the jury rendered at that term of the court, to wit, on the third day of November, 1889, and that no petition for writ of error to the Supreme Court of the United States has been filed with the clerk of this court, and no other proper proceedings for a revision of the finding herein by the Supreme Court of the United States have been begun: It is therefore ordered, adjudged, and decreed by the court that the defendant, John C. Ball, be now remanded to the custody of the marshal, to be by him kept securely confined in the jail of Lamar County,

Texas, until Friday, the 19th day of December, 1890, when he shall be taken therefrom by the marshal, and between the hours of 12 o'clock m. and 4 o'clock p. m. of said 19th day of December, 1890, be hanged by the neck until he, the said John C. Ball, is dead, and the clerk of this court is ordered to issue a death warrant in accordance with this sentence, and deliver the same to the marshal, who shall execute the same according to law. Done in open court July 18, 1890.

DAVID E. BRYANT,
Judge.

It will be observed that this order nowhere adjudges the defendants guilty of murder, but recites that on the 15th day of November, 1889, the sentence of death had been pronounced against the defendants for the crime of murder. Turning to the order of the 15th day of November, 1889, we find likewise that it nowhere adjudges the defendants guilty of murder, but in turn reads as follows:

"By reason of the law, the evidence, and the verdict of the jury."

And then proceeds to order the defendants to be executed, and *does this in their absence*. So that if the order of the court of November 3rd, 1889, entered on Sunday, declaring the defendants guilty "as charged in the indictment and as found by the jury" be held to be ill and of no effect, there is then no judgment of guilt against the defendants or either of them in the proceedings. There are in the record as of November 3d, 1889, page 6; as of November 15th, 1889, page 10, and as of July 18th, 1890, pages 12 and 13, three separate and distinct orders, each purporting to be a final judgment and sentence. The first for the reasons presented, and because it was entered on Sunday, we submit is void. The second, entered in the absence of the defendants, and the third, referring to the preceding, we submit are erroneous,

because they both fail to adjudge the defendants or either of them guilty of any crime, and are utterly deficient in the essential elements which the law requires in a judgment of conviction.

4. We submit that it was error to exclude the testimony of the wives of the defendants, Boutwell and Ball.

Sec. 858 of the Revised Statutes, having made certain exceptions, provides as follows:

> In all other respects the laws of the State in which the court is held shall be the rules of decision as to the competency of witnesses in the courts of the United States in trials at common law, and in equity and admiralty.

Sec. 735 of the Texas Statutes Code, Cr. Pro., provides:

> The husband and wife may in all criminal actions be witnesses for each other, but they shall in no case testify against each other, except in a criminal prosecution for an offense committed by one against the other.

The case at bar presents no exception under the Revised Statutes, and under the Texas statute the wives of the defendants were clearly competent witnesses in their favor. Bill of exceptions number two, referred to in the record, page 7, does not appear. In the motion for arrest of judgment, however, filed November 15th, 1889, record page 7, the fact that exception was taken to the ruling of the court excluding said wives is recited. This motion was denied by the court, record, page 10, by a general order overruling it, and the recital in the motion in arrest is left to stand unquestioned. The object of the bill of exceptions is to preserve upon the record for review questions which otherwise might not appear. It has been held (18 Blatchford, 308; S. C. Fed. Rep., 136; 5 Fed. Rep., 49; 91 U. S., 251, quoted by Desty) that the rules of State practice have no application over courts of error

or bills of exceptions. We are aware of no Federal case precisely in point with the question here presented. It is submitted that the motion in arrest states the fact that the evidence was offered and excluded, and that the fact that the defendants made the exception is acquiesced in by the action of the court. It is, therefore, submitted whether the question is not sufficiently preserved for review by this court.

5. The Court erred, Record page 6, in admitting the testimony of Overton Love.

The bill of exceptions which presents this question is as follows:

> Be it remembered that upon trial of the above-entitled cause in the above stated court on the 31st day of October, A. D. 1889, counsel for the prosecution attempted to prove by Overton Love, a witness summoned to testify in behalf the Government, that he, the said Overton Love, heard W. T. Box, the deceased, say, on the Wednesday before he died, in the county court room at Ardmore, Chickasaw Nation, Indian country, to the county judge of Pickens County, Chickasaw Nation, Indian country, in the presence of R. E. Boutwell and in the absence of M. F. Ball, to whom his (Boxes) daughter was married, that Ball was living on his (Boxes) place in adultery with Boxes daughter, the said daughter (Ball's wife) having being married previous to her marriage to Ball to a white man in the United States. Counsel for the defense objected to this testimony by said witness for the reason that M. F. Ball was not present, and the testimony could not effect the def't Boutwell. The court overruled the objection and permitted the witness to testify; to which ruling of the court counsel for the defendants in open court excepted, and tender this their bill of exceptions, and pray that the same may be signed and made a part of the record in this cause this Oct. 31st, 1889.
>
> J. C. HODGES,
> GUTRIDGE AND FLEMING,
> FULSOM AND ELLIS,
> *Attorneys for Defendants.*

The court admitted the testimony of C. J. Cornish, in which he said that in his presence, at the county court at Ardmore, Indian Territory, Box, the deceased, informed and told Judge Duncan, of the county court, in the presence of Bob Boutwell, one of the defendants, that Filmore Cox, another of the defendants, was living on his, Box, place in adultery with his daughter, and told the judge other things in connection therewith, because the Government counsel said he would show that the language or statement used by Box about Filmore Ball was carried to and made known to Filmore Ball, which the counsel did do later in the examination of said Cornish Oct. 31.

ALECK BOARMAN, *Judge*.

(Endorsed:) No. 3, C. C. The United States *vs.* M. F. Ball, John C. Ball, and R. E. Boutwell. Bill of exceptions, No. 1. Filed Nov. 15, 1889. H. H. Kilpatrick, clerk.

M. F. Ball and R. E. Boutwell were on trial jointly with J. C. Ball for the murder of William T. Box. Love was offered to prove a declaration made by William T. Box in the county court-room at Ardmore, Chickasaw Nation, to the county judge of Pickens County, to the effect that said M. F. Ball was living in adultery with the said Box's daughter. This statement was made in the presence of said Boutwell, but did not relateto him, and in the absence of said Ball. How this testimony could have been material, if admissible on other grounds, does not appear from the record. But how the statement of Box, referring to said Ball and in the absence of said Ball and never communicated to said Ball, or to either of the Balls, even if it related to a material fact, can stand upon any other ground than that of mere hearsay we cannot understand. If it were offered to prove the fact that Ball was living in adultery with Box's daughter, it is clearly hearsay and incompetent. The testimony had no relation to said Boutwell or to the other Ball. His presence

at the time of the declaration could not supply the absence of Ball, to whom it referred. Even if offered on behalf of said Ball in a case involving self-defense as showing the state of feeling and the disposition of said Box, the declaration of said Box in the absence of said Ball, not communicated to him, would not have been admissible except after proof of other similar declarations which had been communicated. In some of the States it is so admitted.

This was what the court evidently had in mind when it endorsed on this bill of exceptions the statement that similar testimony of a witness named Cornish was admitted upon the assurance by the Government's counsel that it would be followed up by proof that the same was afterward communicated to Ball, which proof was subsequently supplied. The certificate fails to disclose that even this was communicated to Ball *before the homicide*. But here the conditions were different, and the testimony of Love stands in the relation of hearsay evidence, pure and simple.

Suppose, instead of saying that Ball was living in adultery with his daughter, Box, in the absence of Ball, had declared that Ball intended to kill him, upon what theory could this testimony have been admitted? Suppose in the absence of Ball, Box had declared that his daughter and Ball, who were living in adultery, had formed a conspiracy to kill him? Upon what theory could that testimony have been admitted? And suppose Ball had been present and neither acquisced in the statement nor denied it? Upon what theory still could the statement of Box be received in the trial of Ball for the murder of Box to prove that Ball lived in adultery with Box's daughter? The defendant is not before this court on a trial for adultery. If he were he could not be convicted that way. For some reason which does not appear

in the record the relations of Ball and Box's daughter seem to have been in some way a subject of collateral inquiry, but in what aspect of the law could any fact relating to that or any other inquiry be established by the declaration of Box in the absence of the defendant Ball? We submit that the testimony of Overton Love was improperly admitted as to Ball. It is still more clear that on the joint trial of Boutwell and Ball the hearsay evidence of Overton Love, which had no relation to Boutwell, could not be admitted as to him, although he was present when the alleged declarations were made. Even if admitted as to Boutwell, who was present, the jury should have been instructed to disregard this testimony as to Ball, who was absent when the statement was made. In the absence of a complete record of the proceedings some presumptions may favor the lower court with reference to the materiality of testimony, but the character of the testimony is made sufficiently clear by the record and no presumption can divest it of its hearsay and therefore inadmissable quality. There is no pretension in the record that it in any way related to Boutwell nor that Ball ever heard it or heard of it. He was not present when the declarations were made, had no opportunity to deny them, and could not meet them in the trial.

The suggestions here submitted have been substantially covered by the other brief prepared by the local attorneys in Texas, but that brief was so badly printed that much confusion is caused in both its matter and its references. Hence, for the convenience of the Court, we submit in this form the foregoing observations.

JNO. E. KENNA,
CHAS. J. FAULKNER,
Attorneys.

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In the Supreme Court of the United States.

OCTOBER TERM, 1890.

JOHN C. BALL AND ROBERT E. Boutwell, plaintiffs in error,
vs.
THE UNITED STATES.
No. 1351.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

BRIEF FOR THE UNITED STATES.

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BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

This is a writ of error sued out by Ball and Boutwell to a judgment and sentence of the circuit court of the United States for the eastern district of Texas, ordering that the death penalty be inflicted upon them for the crime of murder. The writ of error is brought in accordance with section 6 of the act passed January 25, 1889 (25 Stats., 656).

The first assignment of error (Rec., p. 24) is that the indictment was fatally defective in not alleging where and when the deceased died.

Second, that the court erred in not granting a severance on motion of the three defendants.

Third and fourth, in the fact that the judgment rendered on the verdict was defective and erroneous.

Fifth, in the ruling of the court by which the wives of the respondents were not permitted to testify.

Sixth and seventh, that the judge, Aleck Boarman, who presided at the trial, had no authority to hold court at Paris, Tex.

The assignments of error will be considered in the order above given. The record is fearfully and wonderfully made, but it is thought that no error appears therein to the prejudice of the defendants which entitles them to a reversal of the sentence.

ARGUMENT.

I.

The indictment (Rec., p. 3) charges that one M. F. Ball, and one J. C. Ball, and one R. E. Boutwell, on the 26th day of June, 1889, in Pickins County, in Chickasaw Nation, Indian Territory,

> the same being annexed to and constituting a part of said fifth circuit, and annexed to and constituting a part of the eastern district of Texas, for judicial purposes, and being within the jurisdiction of this court, did unlawfully, fraudulently, and feloniously and with their malice aforethought, and with a certain deadly weapon, to wit, a certain gun in the hands

> of the said M. F. Ball, J. C. Ball, and R. E. Boutwell, then and there held, make an assault in and upon the body of one William T. Box with said gun held as aforesaid, said gun being then and there loaded and charged with gunpowder and leaden balls, then and there held and used as aforesaid, the said M. F. Ball and the J. C. Ball and the said R. E. Boutwell did shoot off and discharge the contents of said gun in and upon the body of the said William T. Box, inflicting thereon ten mortal wounds, of which mortal wounds the said William T. Box did languish and languishing did die.

It must be conceded that the time and place of the death are not alleged. The date of the assault is fixed at the 26th day of June, 1889, and the place of the assault was within the jurisdiction of the court.

It is further conceded that it must appear on the face of the indictment that the time of the death was within a year and a day after the time of the assault, or else the presumption arises that the death was not caused by the wounds inflicted. The authorities cited by counsel for the plaintiffs in error abundantly sustain this proposition. In the present case, however, it does appear on the face of the indictment that the death occurred within a year and a day from the time of the inflicting of the wounds. The allegation of the indictment is that he died, which necessarily implies that he was dead at the time of the finding of the indictment. The indictment was found between the 14th day of October, 1889, and the 17th day of the same month, as appears from the recital in the indictment. (Rec.. p. 2.)

The allegation by the grand jury that Box did die, taken in connection with the date of the indictment, has,

therefore, the effect of an allegation that the death occurred within a year and a day after the infliction of the wounds. The irregularity in the character of the allegation, it is submitted, is cured by the verdict. Said Mr. Justice Blackburn in *Heymann* vs. *Queen* (L. R. 8 Q. B., 102):

> But it is a general rule of pleading at common law—and I think it necessary to say, where there is a question of pleading at common law, there is no distinction between the pleading in civil cases and in criminal cases—where an averment, which is necessary for the support of the pleading, is imperfectly stated, and the verdict on an issue involving that issue is found, if it appears to the court after verdict that the verdict could not have been found in this issue without the proof of this averment, there, after verdict, the defective averment, which might have been bad on demurrer, is cured by the verdict. The authorities upon that position and the principles upon which it proceeds are to be found in 1st Williams Saunders, at page 228, note 1.

It may be admitted that, if there was a total failure to show the death within a year and a day, a verdict could not cure the defect in the indictment; but here, as has been said, there is sufficient to show that the death occurred within the required time; and, though this fact is irregularly stated, it was not objected to by demurrer or otherwise, and after verdict the defect in form can not be taken advantage of.

The failure to state the place of death is not a fatal defect. It might have been fatal at common law, when it was doubtful whether the murderer of a man wounded in one place and dying in another could be tried in either

jurisdiction, and it is still indispensable in those States where the court which has jurisdiction of the crime is the court of the county where the deceased died. *Riggs* vs. *State*, 26 Miss., 51–55. But it is clearly settled by Federal authorities and under the statute that, if the deceased is wounded at one place and dies in another, the murderer may be tried in the place where the wound was inflicted. (Revised Statutes, section 731; *Com.* vs. *McLoon*, 101 Mass., 1, and authorities there cited; *Queen* vs. *Keyn*, 2 Exch. Div., 63; *State* vs. *Bowen*, 16 Kans., 475; *U. S.* vs. *Guiteau*, 1 Mackay, 498.)

The jurisdiction of the circuit court for the eastern district of Texas was made sufficiently to appear in the indictment, therefore, by the allegation that the assault was made and the wounds were inflicted therein. An omission to state the place of death is not, therefore, an omission of an essential element either of the crime or of the jurisdiction of the court. It is not a fatal defect, and if a defect at all, was cured by the verdict.

II.

The court did not err in not granting a severance on the motion of the defendants. The allowance of a separate trial of persons jointly indicted is a matter wholly in the discretion of the court. (*United States* vs. *Marchant*, 12 Wheat., 480.)

III and IV.

These two assignments of error concern the character of the judgment rendered in this case.

The first objection is that a part of the judgment was rendered on Sunday. On Record, page 5, we find the following entry, of the date of November 2, 1889, which was Saturday:

> This cause coming on further to be heard this day, came the United States by her attorney, and the defendants in their own proper persons and by attorneys came, and the hearing of this cause was resumed and the argument of counsel was concluded, and the jury having heard the evidence, the argument of counsel, and received the charge of the court, retired to consider of their verdict, and no verdict being returned at the hour of adjournment, no adjournment is had, and court will remain open for the receipt of the verdict herein.

Immediately follows:

> We, the jury, find the defendants J. C. Ball and R. E. Boutwell guilty as charged in this indictment, and we find M. Filmore Ball not guilty. Nov. 3d, 1889. A. P. Ball, foreman.

The entry "Sunday, November 3d, 1889," on the same page of the Record, contains the formal entry of the verdict, which is followed by these words on page 6:

> It is therefore considered by the court that the defendants, J. C. Ball and R. E. Boutwell, are guilty as charged in the indictment herein and as found by the jury, and it is ordered that they be remanded to the custody of the marshal and be by him committed to the county jail of Lamar County, to await the judgment and sentence of the court. It is further ordered that the defendant M. F. Ball be discharged and go hence without a day.

The only judgment contained in these words is the discharge of M. F. Ball. As to the plaintiffs in error, Ball and Boutwell, there is no judgment or sentence whatever. They are remanded to the jail *to await the judgment and sentence of the court.* As conceded by counsel for the plaintiffs in error, it is entirely within the power of the court to receive a verdict on Sunday. (Bishop on Crim. Procedure, sec. 1001, and cases cited under Note 2.) The Record here shows that there was no adjournment of the court on Saturday, and that the court remained open by continuous session of Saturday into Sunday to receive the verdict. The authorities cited to show that Sunday is a *dies non juridicus*, and that a judgment can not be rendered thereon which is valid, have no application to the present case.

On the minutes of November 15, 1889 (Rec., p. 10), we find the following:

> The motion of the defendants for a new trial and in arrest of judgment herein coming on to be heard, because it is the opinion of the court that the law is against the motion, the same is overruled, to which ruling of the court defendants excepted.

After this comes the following order or judgment:

> By reason of the law and the evidence and the verdict of the jury in this case, it is ordered and adjudged that the defendants, Robt. E. Boutwell and John C. Ball, be executed by being hung, until each and either are dead, according to the forms, delays, and processes provided in the laws of the United States.
>
> This done and signed in open court Nov. 15, 1889.
>
> ALECK BOARMAN, *Judge.*

Immediately after this judgment comes the following minute entry of the same date:

> This day the defendants in open court excepted to the sentence of the court this day pronounced upon them.

It is objected to this judgment that it nowhere appears that the defendants were present when the sentence was pronounced. Their presence must be presumed from the fact that they excepted in open court to the sentence, and that they were present to make a motion for a new trial and in arrest of judgment before the sentence was pronounced. (Wharton's Crim. Pl. and Pr., sec. 551; *Kie* v. *United States*, 27 Fed. Rep., 351; *State* v. *Lewis*, 69 Mo., 92 *State* vs. *Cartwright*, 10 Or., 193; *Stephens* vs. *The People*, 19 N. Y., 549; *State* vs. *Schoenwald*, 31 Mo., 147; *Schirmer* vs. *People*, 33 Ill., 276.)

It is said that there is no judgment in this order. The judgment is the sentence. It is true there is no special finding of the court that the defendants were guilty, but the jury found that they were guilty, and that verdict is all that the judgment of the court need be based upon.

The learned counsel for the defendants go into an extended argument to show that the judgment or sentence itself should contain a description of the crime of which the defendants are guilty independent of any reference to the indictment, and the argument is based upon the abuses which might arise in the enforcement of judgments so framed as to require an inspection of the indictment to de-

termine for what crime the defendants are being punished. The indictment is always a part of the record and is just as necessary a part as the verdict or the judgment. If the judgment can be made definite and clear by reference either to the indictment or the verdict that is sufficient. The argument *ab inconvenienti* based on a supposed loss of the indictment has little or no force. It is not understood why there is any more danger of losing the indictment or the record of it than there is of losing the record of the judgment itself. In the latter case resort would have to be had to secondary evidence to prove the contents of the judgment, just as, in the case supposed by counsel for the defense, the contents of the indictment would have to be so proven in case of its loss. That is certain which can be made certain. The judgment is founded on the indictment and verdict, and a reference thereto for the description of the offense is exactly as certain as if the description had been set out in the judgment.

It is objected that the sentence announced on the 15th of November, by Judge Boarman is joint, and it is claimed that, though the defendants were convicted on a joint indictment, they must have been separately sentenced. It is admitted that the punishment of each must be suffered by him, and that the sentence should impose the punishment on each. Such, however, is the effect of the sentence of Judge Boarman, for the language is that the defendants "be executed by being hung until each and either are dead." This is a several sentence, and certainly

could not be satisfied by the execution of one. Mr. Bishop in his work on Criminal Procedure, 1st vol., sec. 1035, says:

> The punishment we have seen is to be several, and the sentence is in form several, not joint. It requires each to render the full penalty, the same as though he had done the criminal act or had been convicted, alone.

It is respectfully submitted that the sentence of Judge Boarman requires each to suffer the full penalty of death, and that it is therefore several, not joint, in form and substance. The better practice, of course, is to impose a separate sentence on each defendant, and that practice was subsequently followed by Judge Bryant in his orders and sentences on pages 12 and 13 of the record.

It is next objected that the sentence is erroneous because it fixes no time for the execution. The time was evidently not fixed by Judge Boarman because he expected the case to be taken up on error or to be delayed by some other proceeding in the nature of a proceeding in error. The sentence shows on its face that it was made with the expectation that the time for the execution of the sentence should be fixed thereafter by the court. The time for the execution of the sentence at common law, and in the absence of statute requiring the court to fix the same at the time of sentence, is no part of the judgment of the court. (*Holden* vs. *State of Minnesota*, 137 U. S., 483–495; *Atkinson* vs. *The King*, 3 Bro. P. C., 2d ed., 517, 529; *Rex* vs. *Rogers*, 3 Burrow, 1809, 1812; *Rex* vs. *Doyle*, 1 Leach, 4th ed., 67; *Cuthcart* vs. *Commonwealth*,

37 Penn. St., 108, 115; *Costley* vs. *Commonwealth*, *Commonwealth* vs. *Costley*, 118 Mass., 1, 35; *Howard, ex parte*, 17 N. H., 545–548; *McDowell* vs. *Couch*, 6 La. Ann., 365, 369, State *vs.* Oscar, 13 La. Ann., 297; 4 Cooley's Blackst., 404; Wharton's Crim. Pl. and Pr., sec. 916.

At common law the time of the execution of the sentence was left to be fixed by rule of court of King's Bench, or was left to the discretion of the person charged with the execution of the sentence. Where the statute does not forbid it is a matter of frequent practice, as will be seen by reference to Dr. Wharton's work above cited, to allow the day to be fixed at some future time on motion by the court. There is no United States statute requiring the court to accompany its sentence of death with an order for the time of execution. It was not, therefore, erroneous for the court to postpone the fixing of the day until some future time on motion.

V.

The fifth assignment of error is that the court erred in not allowing the wives of the respondents to testify. The only reference to this ground in the Record is to be found on page 7, in a recital of the reasons why a motion for a new trial and to arrest the judgment should be granted, where the ground is stated thus:

> Third. Because the court erred to the prejudice of the defendants in refusing to permit the wives of defendants, J. C. Ball and R. E. Boutwell, to testify in favor of any or either or all of said defendants upon trial hereof, as shown by bill of exceptions No. 2.

No such bill of exceptions appears in the record. This court is therefore not made to know either that the wives of Ball and Boutwell were offered as witnesses, or that the court refused to allow them to testify, or, in fact, that Ball and Boutwell had any wives.

Another error which is assigned in the brief of counsel, but which is not contained in the assignments of error in the record (pp. 24, 25, and 26), is the alleged error committed by the court as set out in the so-called bill of exceptions spread upon page 6 of the record. In the first place the so-called bill of exceptions is not signed by the judge. Immediately following the statement as to the evidence of Overton Love, which was signed only by counsel for defendants, is a statement by Judge Boarman with reference to the evidence of another witness, but it is not understood how the two statements can be so united as to give to the first the character of a bill of exceptions properly certified to by the court.

But, conceding that the statement is in proper form, a bill of exceptions, the recital is not sufficient to show that there was error upon the part of the court in admitting the statement of Love. The evidence, as there given, was that Love heard Box, the deceased, say on the Wednesday before he died, in the presence of one of the defendants, Boutwell, and in the absence of M. F. Ball, another defendant, to whom Box's daughter was married, that said Ball was living on Box's place in adultery with Box's daughter, who had been married to a white man in the United States before her alleged marriage to Ball.

Defendants' counsel objected to the evidence, for the reason that M. F. Ball was not present, and the testimony could not affect the defendant, Boutwell. M. F. Ball, it will be observed, was acquitted of any complicity in the murder of Box. It does not appear how this evidence, even if it were incompetent, could prejudice the case of Boutwell, nor does it appear that it might not have been made competent against Boutwell by other evidence in the case not set out in the bill of exceptions. It might have been relevant to show that Boutwell had knowledge of the exact relation between M. F. Ball and the person with whom he was living as his wife. In a great many ways the fact that Boutwell was told something, might tend to show a motive on his part for the commission of the crime. It is impossible for the court to determine, in the absence of the evidence in the case or some statement of the case, whether the testimony of Love was competent as against Boutwell or not. The presumption is that it was, because the court admitted it, and in the absence of something to show that it was not no error can be assigned to the ruling of the court. If it were competent against one other of the defendants it could not be excluded simply because it was not admissible against Boutwell.

VI AND VII.

The sixth and seventh assignments of error (Rec., pp. 25 and 26) relate to the authority of Judge Boarman to hold the circuit court of the United States at Paris, Tex. By stipulation between counsel for both parties, the order made by Judge Pardee on the 4th of December, 1888,

has been incorporated in the record and printed on a separate slip. In this order Judge Pardee designates and appoints Judge Boarman

> To hold the coming terms of the district and circuit courts in said eastern district of Texas, during the year 1889 and during the disability of the judge of said district, and to have and exercise within said district during said period and during such disability the powers that are vested by law in the judge of said district.

This order was made at Galveston and entered on the minutes of the court at the November term of the district court, December 4, 1888. The order was made by reason of the certificate of the clerk of the United States district court for the eastern district of Texas, December 4, 1888, that Judge Sabin, the judge of that district, was prevented by illness from holding the coming terms of court in the year 1889. After the order was made, by an act of Congress approved March 1, 1889, section 18 (25 Stats., 786), two separate terms of the circuit court at Paris in the same district were established, the one to begin the third Monday of April and the other the second Monday in October. As the order applied to all the terms of the circuit court to be held in the eastern district of Texas, it of course applied to the terms held at Paris. The order was made under section 591, R. S. This seems to leave no question of the validity of Judge Boarman's acts as judge in the eastern district of Texas at the October term held at Paris, at which the defendants below were indicted, tried, convicted, and sentenced by him.

It is also objected, though not assigned for error in the record, that the orders of Judge Bryant, entered on the 18th of July, 1890, fixing the time for the execution of the defendants, were made at a term which had lapsed. The argument is as follows: Judge Sabin, the district judge for the eastern district of Texas, died on March 30. The office of judge of that district became vacant. Under section 602—

> When the office of judge of any district court is vacant, all process, pleadings, and proceedings pending before such court shall be continued, of course, until the next stated term after the appointment and qualification of his successor, except when such first-mentioned term is held as provided in the next section.

Section 603 provides that when the office of a district judge is vacant in any district in a State containing two or more districts, the judge of either of the other districts may hold the district court or the circuit court.

Now, the contention is that Judge Boarman was not a judge of any district in Texas, and therefore was not entitled under section 603 to hold court in Texas after the death of Judge Sabin. Judge Boarman held the stated term of the circuit court for the eastern district of Texas, beginning on the third Monday in April, after the death of Judge Sabin. Judge Bryant was sworn in as the successor of Judge Sabin June 2, 1890, and held court at Paris thereafter.

The contention is that Judge Boarman had no authority to hold the April term and that it lapsed, and that Judge Bryant, under section 602, had no authority to hold court

at Paris until the succeeding term, beginning on the second Monday in October. It is therefore argued that the orders entered by him on the 18th of July, 1890, fixing the time for the execution of the defendants, were made and entered at a time when he had no authority to hold court and were void. They are the final judgments, it is said, and should be reversed.

The answers to this argument are two: First, it is immaterial whether the orders made by Judge Bryant in July, 1890, fixing the time for the execution of the sentences imposed by Judge Boarman are void or not. The stay under the act of January 25, 1889, prevented them from being carried out. They are of no effect in any event. They were no part of the judgment, properly speaking, to which a writ of error could be taken. If the judgment of the court below imposing the death penalty is affirmed, then the court below must again fix the time for execution. It can not invalidate the sentence of Judge Boarman that the order thereafter fixing the time for the execution was void.

In *Lowenberg* vs. *The People* (27 N. Y. Repts., 336), where the court of general sessions had improperly sentenced a prisoner to be executed on a fixed day, that being the only error in the proceedings, and the Supreme Court, after the day fixed for the execution had passed, affirmed the judgment without fixing a new day for the execution, it was held that the erroneous part of the sentence being void, and having become by the lapse of time incapable of any operation, the error was cured. Said the court:

> The convict having procured the stay of proceedings until the day of execution had passed, the error

> had, by his act, become wholly immaterial, and he could not require the Supreme Court to reverse a judgment otherwise unobjectionable on account of a separable addition thereto void in itself, and which the lapse of time had rendered wholly nugatory. No error being found in that part of the judgment which remained capable of any operation, the Supreme Court were right in affirming it.

The second reason why the objection based on Judge Bryant's want of power to hold court in July has no validity is in the fact that an order fixing the time of execution may be made in vacation. It is analogous to the issue of execution by the clerk. It is a mere ministerial duty, and requires no stated term of court in which to have it entered. In the case of *Costley* vs. *Com.* 118 Mass., 1, 35) Mr. Justice Gray, then Chief Justice of the Supreme Judicial court of Massachusetts, used the following language:

> But the issue of an execution in any case, criminal or civil, is not an exercise of judicial power, but a mere ministerial act, which may be authorized by law to be done by the clerk, and the fixing of a time and place of execution is no part of the judgment or sentence of death. It may be regulated by statute so as to be done by order of the court contemporaneously with the sentence, or by the governor and council, or even, as by the common law of England, left to the discretion of the sheriff.

It is submitted that the ministerial character of the order fixing the time and place of execution is such that the failure of the judge to make the order at a stated term

does not invalidate it. This disposes of all the errors assigned in the record or discussed in the briefs.

The writ of error was not sued out within the time required by law after the final judgment and the court has therefore no jurisdiction to entertain the same.

In the discussion of the third and fourth assignments of error reasons were given which it is respectfully contended are sufficient to show that the judgment rendered by Judge Boarman on the 15th of November fulfilled all the requirements of a valid judgment and sentence of death against the defendants. It was, therefore, a final judgment, to which a writ of error should have been sued out within the time prescribed by the sixth section of the act of the 25th of January, 1889. That section requires that the writ of error should be sued out during the term at which the judgment is entered, or within 60 days after the end of the term if such enlargement of the time is allowed by the judge.

The term at which the sentence below was put on record was the October term, 1889. The next term of the same court met on the third Monday of April, 1890. The October term certainly must have ended by that time. The writ of error herein was not allowed, and did not issue until the 9th of September, 1890, considerably more than sixty days after the beginning of the April term, 1890. It therefore appears that this court has no jurisdiction to entertain the writ of error.

The orders of Judge Bryant entered July 18, 1890, were in no sense final judgments. They do not purport to be such, for they in terms refer to the judgment and

sentence of Judge Boarman entered on the 15th of November, 1889, and are made expressly because no proceedings in error had been taken from that sentence. It is submitted that the writ of error should be dismissed for want of jurisdiction.

If, however, the court shall hold that it has jurisdiction, then it is submitted on the whole case that no error appears of record to the prejudice of the defendants to require a reversal of the judgment.

WM. H. TAFT,
Solicitor-General.